No. 15-674

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MONTANA, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WEST VIRGINIA, WISCONSIN; PAUL R. LEPAGE, GOVERNOR, STATE OF MAINE; PATRICK L. MCCRORY, GOVERNOR, STATE OF NORTH CAROLINA; C.L. "BUTCH" OTTER, GOVERNOR, STATE OF IDAHO; PHIL BRYANT, GOVERNOR, STATE OF MISSISSIPPI; BILL SCHUETTE, ATTORNEY GENERAL, STATE OF MICHIGAN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE STATE RESPONDENTS

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QUESTIONS PRESENTED

The Executive Branch unilaterally created a program that would deem four million unlawfully present aliens to be "lawfully present" and eligible for a host of benefits including work authorization. Pet. App. 413a. This program, called DAPA, goes far beyond forbearing from removal or enforcement discretion.

The district court entered a preliminary injunction of DAPA under the Administrative Procedure Act. The court of appeals affirmed. Both courts explained that the injunction does not require the Executive to remove any alien and does not impair the Executive's ability to prioritize aliens for removal. In fact, on the same day it announced DAPA, the Executive issued a separate memorandum defining categories of aliens prioritized for removal. This lawsuit has never challenged that separate memorandum. The questions presented are:

1.a. Whether at least one plaintiff State has a personal stake in this controversy sufficient for standing, when record evidence confirms that DAPA will cause States to incur millions of dollars in injuries.

1.b. Whether DAPA—which affirmatively grants lawful presence and work-authorization eligibility—is reviewable agency action under the APA.

2. Whether DAPA violates immigration and related benefits statutes, when Congress has created detailed criteria for which aliens may be lawfully present, work, and receive benefits in this country.

3. Whether DAPA—one of the largest changes in immigration policy in our Nation's history—is subject to the APA's notice-and-comment requirement.

4. Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3.

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INTRODUCTION

The Executive Branch unilaterally created a program—known as DAPA—that contravenes Congress's complex statutory framework for determining when an alien may lawfully enter, remain in, and work in the country. DAPA would deem over four million unlawfully present aliens as "lawfully present" and eligible for work authorization. Pet. App. 413a. And "lawful presence" is an immigration classification established by Congress that is necessary for valuable benefits, such as Medicare and Social Security.

The Executive does not dispute that DAPA would be one of the largest changes in immigration policy in our Nation's history. The President himself described DAPA as "an action to change the law." Pet. App. 384a. Yet the Executive claims it may effect this change without even conventional notice-and-comment procedure.

Far from interfering with the Executive's removal discretion, the preliminary injunction of DAPA does not require the Executive to remove any alien. And this lawsuit has never challenged the Executive's separate memorandum establishing three categories of aliens prioritized for removal. Pet. App. 420a-29a.

This case is about an unprecedented, sweeping assertion of Executive power. This case is not about the wisdom of particular immigration policies; legislators have disagreed on whether immigration statutes should be amended. But when Congress has established certain conduct as unlawful, the separation of powers does not permit the Executive to unilaterally declare that conduct lawful.

STATEMENT

I. Congress's Extensive Statutory Framework for Lawful Presence and Work Authorization

"Policies pertaining to the entry of aliens and their right to remain here are ... entrusted exclusively to Congress." *Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012); *see* U.S. Const. art. I, § 8, cl. 4. "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quotation marks omitted).

Congress has accordingly enacted "extensive and complex" statutes governing "immigration and alien status." *Arizona*, 132 S. Ct. at 2499. Title 8 of the United States Code, dealing with immigration, functions as a "single integrated and all-embracing system" governing the presence of aliens in the country. *Id.* at 2501.

A. Lawful Presence

Congress has not given the Executive *carte blanche* to permit aliens to be lawfully present in the country. On the contrary, through the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq.*, Congress delineated "specified categories of aliens" who may be admitted into and present in the country, *Arizona*, 132 S. Ct. at 2499, as well as consequences of unlawful presence.

1. The INA creates two primary categories of aliens permitted to be present in the country:

- Aliens with temporary "nonimmigrant" visas. 8 U.S.C. § 1101(a)(15)(A)-(V). Congress established "more than 40 nonimmigrant U.S. visa categories," each extensively defining which al-

iens qualify.[1] The Executive "may at any time, in [its] discretion, revoke such visa." 8 U.S.C. § 1201(i).

- Aliens admitted for lawful permanent residence (LPRs). This includes LPRs who lawfully entered the country with an "immigrant" visa. *Id.* §§ 1101(a)(20), 1151, 1153, 1181. It also includes LPRs who went through "adjustment of status." *Id.* §§ 1159, 1255.[2]

Aliens generally must have visas to be admitted into the country. *Id.* §§ 1181, 1184. That requires meeting the above-cited visa criteria, while avoiding numerous other grounds that make aliens "ineligible to receive visas and ineligible to be admitted to the United States." *Id.* § 1182(a). Congress also capped the number of immigrant visas and nonimmigrant temporary-work visas available each year, with limited exceptions. *Id.* §§ 1151-1153, 1184(g). And Congress required registration of aliens seeking visas. *Id.* §§ 1301-1303.

Congress also created other avenues for aliens to be temporarily present in the country, such as:

- Admission as a refugee. *Id.* §§ 1157, 1159.
- Asylum. *Id.* § 1158.
- Temporary protected status, which permits an alien to be present temporarily based on inability

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[1] USCIS, *How Do I Change to Another Nonimmigrant Status?* 1 (Oct. 2013) (*Nonimmigrant Guide*), https://www.uscis.gov/sites/default/files/USCIS/Resources/C2en.pdf.

[2] Congress prohibited unlawfully present aliens from adjusting to LPR status, 8 U.S.C. § 1255(a), (c), subject to exceptions that Congress expressly creates, *see, e.g.*, *id.* § 1255(i), 1255 note.

to return to a home country due to strife or disaster. *Id.* § 1254a.

- The visa-waiver program, which permits aliens from certain countries to be present for 90 days without a visa. *Id.* § 1187.
- Humanitarian "parole" into the country, available only "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." *Id.* § 1182(d)(5)(A).[3]

And when Congress has seen fit to grant lawful presence to a significant portion of the aliens present unlawfully in the country, it has enacted legislation to do so. *E.g.*, *id.* §§ 1160, 1254a (1986 legislation).

Congress strictly limited an alien's ability to acquire lawful presence on family-unification grounds. Alien parents have *no* way to obtain lawful presence based on their child's LPR status. And alien parents can obtain lawful presence based on their child's citizen status only by fulfilling a number of demanding requirements, which typically include waiting until the child turns 21, leaving the country, and waiting out a 10-year reentry bar. *Id.* §§ 1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(II), 1201(a), 1255.

2. Unlawfully present aliens may be removed from the country. *Id.* §§ 1229a, 1231. An alien is removable as "inadmissible" if "present in the United States without being admitted or paroled." *Id.* § 1182(a)(6)(A)(i). An

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[3] Humanitarian parole "shall not be regarded as an admission of the alien" into the country. 8 U.S.C. § 1182(d)(5)(A). "[A]dmission" means "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Id.* § 1101(a)(13)(A).

alien is removable as "deportable" if lawfully admitted but now present "in violation of this chapter or any other law of the United States." *Id.* § 1227(a)(1)(B).

Defendants and intervenors assert, without statutory citation, that an alien's designation as "lawfully present" is not a defense to removal. Pet. Br. 38 (Br.); Intervenors' Br. 51 (Intv'r Br.). But defendants also assert, Br. 9 n.3, that an alien granted lawful presence is *not* "present in the United States without being admitted or paroled." 8 U.S.C. § 1182(a)(9)(B)(ii); *see also id.* § 1229a(c)(2)(B) (requiring alien to show that he "is lawfully present in the United States pursuant to a prior admission" to avoid removal). That directly negates the charge that an alien is removable as present "without being admitted or paroled." *Id.* § 1182(a)(6)(A)(i). Lawful presence also appears to negate the charge that an alien is removable as "present in the United States in violation of [federal law]." *Id.* § 1227(a)(1)(B).

Congress has, of course, imposed limitations on removal. *E.g.*, *id.* §§ 1229b (cancellation of removal), 1231(b)(3) (withholding of removal). And due to limited enforcement resources, the Executive generally has "discretion to abandon" removal proceedings on a "case-by-case basis"—forbearance rooted in prosecutorial discretion and known as "deferred action." *Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 483-84 & n.8 (1999) (*AADC*). In four narrow contexts, Congress provided statutory authority to grant class-based "deferred action" with attendant legal consequences. *See* Pet. App. 190a & n.78 (collecting statutes).

3. To further deter unlawful immigration, Congress attached other significant consequences (besides removal) to the unlawfulness of an alien's presence in this country.

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), an alien accrues time towards a 3- or 10-year reentry bar while the alien is "unlawfully present." 8 U.S.C. § 1182(a)(9)(B)(i). The definition of "unlawfully present" includes two categories of aliens: those present after the expiration of an authorized stay period, and those "present in the United States without being admitted or paroled." *Id.* § 1182(a)(9)(B)(ii).

Congress also made lawful presence necessary for important benefits, such as:

- Social Security. 8 U.S.C. § 1611(a), (b)(2) (no restriction on Social Security retirement benefits for aliens "lawfully present"); 42 U.S.C. § 402(y) (benefits not payable unless alien "lawfully present"); J.A. 768-69.
- Medicare. 8 U.S.C. § 1611(a), (b)(3) (no restriction on certain Medicare benefits for aliens "lawfully present"); 42 U.S.C. § 1395c (Medicare eligibility concurrent with Social Security eligibility).
- Backpay for violations of the National Labor Relations Act. 29 U.S.C. § 158; *see Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 149 (2002).

B. Work Authorization

1. The Immigration Reform and Control Act of 1986 (IRCA) created "a comprehensive framework for 'combating the employment of illegal aliens.'" *Arizona*, 132 S. Ct. at 2504 (quoting *Hoffman*, 535 U.S. at 147). Breaking with previous law, Congress created penalties for employers who hire "unauthorized aliens"—another

mechanism for discouraging unlawful immigration. 8 U.S.C. § 1324a(a), (f); *see* Pet. App. 346a.

Unauthorized employment also has legal consequences for the alien. It generally makes aliens ineligible to adjust to LPR status, 8 U.S.C. § 1255(c)(2), and forecloses any available tolling of the unlawful-presence clock under IIRIRA's reentry bar, *id.* § 1182(a)(9)(B)(iv).

Furthermore, work authorization allows aliens to obtain a Social Security number, Pet. C.A. Br. 49—and therefore eligibility for the valuable Earned Income Tax Credit (EITC), Pet. App. 355a n.64 (citing IRS Commissioner testimony); *see* 26 U.S.C. § 32(c)(1)(E), (m); J.A. 766-67. This reflects the view that aliens' receipt of work authorization connotes that their "*status* is so changed as to make it lawful for them to engage in such employment," thus allowing a Social Security number to issue. 42 U.S.C. § 405(c)(2)(B)(i)(I) (emphasis added); *accord* 20 C.F.R. § 422.104(a)(2).

2. As with lawful presence, Congress has not given the Executive free rein to grant work authorization. Instead, Congress intricately defined which aliens are authorized for employment in the country.

About 20 nonimmigrant-visa categories directly authorize employment. *E.g.*, 8 U.S.C. § 1101(a)(15)(H) (temporary employment of certain nonimmigrants), (P) (entertainment work); *see Nonimmigrant Guide*, *supra*, at 2.

Congress also requires the Executive to authorize employment of other categories of aliens, such as:

- Asylum holders, 8 U.S.C. § 1158(c)(1)(B);
- Temporary protected status, *id.* § 1254a(a)(1)(B);
- Aliens granted and applying for IRCA relief, *id.* § 1255a(b)(3), (e)(1)-(2);

- Aliens granted "Family Unity" under the Immigration Act of 1990, Pub. L. No. 101-649, tit. III, § 301, 104 Stat. 4978, 5029 (codified as amended at 8 U.S.C. § 1255a note).

Lastly, Congress provided that aliens in certain categories are "eligible" for or "may" receive work authorization from the Executive, for example:

- Asylum applicants, 8 U.S.C. § 1158(d)(2);
- Certain battered spouses of nonimmigrants, *id.* § 1105a(a);
- Certain agricultural worker preliminary applicants, *id.* § 1160(d)(3)(A);
- Certain nationals applying for status adjustment;[4]
- Deferred-action U-visa applicants;[5]
- Deferred-action family members of LPRs killed on September 11, 2001;[6]
- Deferred-action family members of U.S. citizens killed in combat;[7] and
- Deferred-action Violence Against Women Act (VAWA) self-petitioners and family members.[8]

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[4] Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, div. A, § 101(h), tit. IX, § 902(c)(3), 112 Stat. 2681–538, 2681–539; Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, tit. II, § 202(c)(3), 111 Stat. 2160, 2193 (1997).

[5] 8 U.S.C. § 1184(p)(6); *see id.* § 1227(d)(1)-(2).

[6] USA PATRIOT Act of 2001, Pub. L. No. 107-56, tit. IV, § 423(b)(1)-(2), 115 Stat. 272, 361.

[7] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, tit. XVII, § 1703(c)(2), 117 Stat. 1392, 1694-95.

[8] 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV), (a)(1)(K).

II. The DACA Directive

The President has urged Congress to pass the DREAM Act, *see* J.A. 14-16, 387, which would generally allow unlawfully present aliens to apply for conditional permanent-resident status if, among other things, they had been in the country continuously for five years and entered before age 16. J.A. 171-72. Congress has repeatedly refused. *See* S. 1291, 107th Cong. (2001) (initial bill filed 15 years ago).

Nevertheless, on June 15, 2012, the Executive created a program called Deferred Action for Childhood Arrivals, or DACA. J.A. 102-06. DACA grants a two-year "deferred action" term to unlawfully present aliens who entered the country at least five years before DACA's promulgation, entered before age 16, and were under age 31 as of DACA's promulgation, among other criteria. J.A. 103. The Executive described DACA as an "exercise of prosecutorial discretion" "on an individual basis." J.A. 104. But, as the district court found based on extensive record evidence, Executive officials mechanically approve applications that meet DACA's eligibility criteria. Pet. App. 386a-89a; *e.g.*, J.A. 330-31, 396-97, 547-49, 639-40; *see infra* pp.62-66.

The DACA memo itself said nothing about conferring lawful presence. *See* J.A. 102-06. But the Executive has deemed DACA recipients lawfully present, J.A. 557-58, and eligible for work authorization, J.A. 106.

After DACA's announcement, the President emphasized that DACA marked the outer limit of his Executive powers: "But if we start broadening that, then essentially I would be ignoring the law in a way that I think would be very difficult to defend legally." J.A. 388.

III. The Unchallenged Prioritization Memo

Pursuant to delegated authority to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), the Executive issued a memorandum on November 20, 2014 creating three categories of aliens prioritized for removal. Pet. App. 420a-29a.

The first category includes aliens who are "threats to national security, border security, and public safety," who generally "must be prioritized" for removal. Pet. App. 423a-24a. The second category covers "misdemeanants and new immigration violators," who generally "should be removed." Pet. App. 424a-25a. The third category encompasses aliens who have committed "other immigration violations" and were recently issued a removal order; these aliens are the lowest removal priority. Pet. App. 426a. All other unlawfully present aliens, the memorandum states, can be removed only if an ICE Field Office Director decides that doing so would "serve an important federal interest." Pet. App. 426a.

This prioritization memorandum is not challenged.[9]

IV. DAPA—The Challenged Directive

After creating DACA, the President urged Congress to comprehensively amend immigration statutes. J.A. 23-26. The 113th Congress did not. So the President responded with unilateral Executive action: DAPA, the November 20, 2014 directive challenged here. Pet. App. 411a-19a.

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[9] The Executive's claim (Br. 4) to be enforcing immigration laws at a record pace, however, is "highly misleading." Pet. App. 52a n.118. It counts only court-ordered "removals" and "ignor[es] 'returns' (which are deportations achieved without court order)." *Id.* Counting both, the "total number of deportations is at its lowest level since the mid-1970's." *Id.*

The DAPA directive covers about four million unlawfully present aliens. Pet. App. 6a; J.A. 95-96. It first expands the class eligible for DACA by: (1) eliminating the age cap, (2) increasing the term from two to three years, and (3) pushing the date-of-entry deadline from 2007 to 2010. Pet. App. 415a-16a.

It then "direct[s]" the relevant Department of Homeland Security component (USCIS) "to establish a process, similar to DACA," for granting three-year terms of "deferred action" to a new class of aliens: those who (1) have a child who is a citizen or LPR, (2) lack authorization to be present in the country, (3) have been present since January 1, 2010, (4) are not one of three enforcement priorities identified in the separate and unchallenged November 20, 2014 memorandum, and (5) "present no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Pet. App. 416a-17a. This second program is known as Deferred Action for Parents of Americans and Lawful Permanent Residents. Pet. App. 244a, 383a. For brevity, this brief uses "DAPA" for the directive creating this program and expanding DACA.

DAPA does not merely forbear from removing aliens who qualify. It affirmatively grants lawful presence to aliens who would otherwise be unlawfully present:

> Deferred action ... means that, for a specified period of time, an individual is permitted to be *lawfully present* in the United States.

Pet. App. 413a (emphasis added). The directive also provides that DAPA recipients are eligible for work authorization. Pet. App. 417a-18a.

DAPA therefore triggers numerous consequences. It removes eligibility bars for Social Security, Medicare, and the Earned Income Tax Credit; tolls the reentry-

bar clock; and gives access to "advance parole," which allows aliens to leave the country and reenter, *see* R.587-88;[10] J.A. 402, 598-601; *cf.* 8 U.S.C. § 1182(d)(5)(A). In addition to these federal benefits, DAPA also renders aliens eligible for many state benefits, such as driver's licenses[11] and unemployment insurance.[12] The nonpartisan congressional Joint Committee on Taxation estimates that, over a 10-year period, DAPA recipients could receive $1.7 billion in Earned Income Tax Credit payments alone. J.A. 767.[13]

The DAPA memo represented that deferred action confers no "pathway to citizenship." Pet. App. 419a. But the "advance parole" allowed for deferred-action recipients has apparently resulted in adjustment to LPR status—and thus a pathway to citizenship, 8 U.S.C. § 1427(a)—for a number of DACA recipients.[14] *Cf.* J.A. 403 (Executive "does not track" how many "DACA re-

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[10] The Fifth Circuit electronic record on appeal is cited as "R."

[11] Pet. App. 20a-21a, 272a n.14; *e.g.*, Tex. Transp. Code § 521.142(a); La. Stat. § 32:409.1; J.A. 354-64 (Wisconsin).

[12] *E.g.*, Ark. Code § 11-10-511; Tex. Lab. Code § 207.043(a)(3); J.A. 365-66 (Indiana), 383-84 (Wisconsin). 8 U.S.C. § 1621(d) is limited to aliens "not lawfully present" and thus does not interfere with state benefits for DAPA recipients.

[13] The Congressional Budget Office letter cited by defendants, Br. 47, addresses only the 2015-2025 timeframe. Medicare and Social Security payments to recipients would balloon in later years.

[14] Immigrant Legal Res. Ctr., *Practice Advisory: From Advance Parole to a Green Card for DACA Recipients* 7 (Feb. 18, 2016), http://www.adminrelief.org/resources/item.592261-Practice_Advisory_From_Advance_Parole_to_a_Green_Card_for_DACA_Recipients ("Indeed, a number of DACA applicants have successfully adjusted their status after being paroled back into the United States.").

cipients" obtained "advance parole" and received "LPR" status).

Shortly after DAPA issued, the President admitted, "I just took an action to change the law." Pet. App. 384a. The President later explained that DAPA "expanded [his] authorities," J.A. 801, and conceded that DAPA recipients would get "a legal status."[15]

V. Procedural History

Plaintiffs, respondents here, represent a majority of the States in the Union. This lawsuit alleges that DAPA violates the Administrative Procedure Act, 5 U.S.C. §§ 553, 706 (APA), and the Constitution's Take Care Clause, art. II, § 3. J.A. 34-37.

Plaintiffs moved for a preliminary injunction, R.137-82, and submitted over 1,000 pages of evidence including numerous declarations, R.1247-2307. After a hearing, R.5120-257, the district court issued a detailed opinion preliminarily enjoining DAPA, Pet. App. 244a-406a.

Defendants appealed and moved for a stay pending appeal, which the district court denied. *Texas v. United States*, No. 1:14-cv-00254, 2015 WL 1540022, at *8 (S.D. Tex. Apr. 7, 2015). The Fifth Circuit denied defendants' stay motion in a lengthy opinion, after over two hours of oral argument. Pet. App. 156a-210a. Judge Higginson dissented. Pet. App. 211a-43a. Defendants did not file a stay application in this Court.

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[15] The White House, *Remarks by President Obama in Press Conference After G7 Summit* (June 8, 2015), https://www.whitehouse.gov/the-press-office/2015/06/08/remarks-president-obama-press-conference-after-g7-summit.

After regular briefing, two rounds of supplemental briefing, and two more hours of oral argument, the Fifth Circuit affirmed the district court's preliminary injunction of DAPA. Pet. App. 1a-90a. The court held that plaintiffs have standing, Pet. App. 20a-36a, and DAPA is reviewable, Pet. App. 36a-53a. On the merits, the court found DAPA unlawful both procedurally (as promulgated without notice and comment) and substantively (as foreclosed by immigration statutes). Pet. App. 53a-86a. The court further agreed that plaintiffs satisfied the equitable requirements for a preliminary injunction. Pet. App. 86a-90a. Judge King dissented. Pet. App. 91a-155a. The Fifth Circuit also allowed three prospective DAPA applicants, proceeding under pseudonyms, to intervene. J.A. 5.

SUMMARY OF ARGUMENT

The preliminary injunction of DAPA is necessary to uphold the separation of powers and ensure the proper functioning of the administrative state.

I. The plaintiff States have standing on multiple independent grounds. The first two are based on financial injury—a classic basis for standing that would establish a sufficient personal stake in the controversy for any ordinary litigant.

First, DAPA will directly impose substantial costs on States by causing numerous DAPA recipients to apply for driver's licenses. This harm is not negated by the self-inflicted-injury doctrine, which applies only when a plaintiff manufactures standing.

Second, DAPA will cause States to incur additional healthcare, education, and law-enforcement costs. The district court found, based on record evidence, that DAPA will cause aliens who would have otherwise left the country to remain and consume these costly services.

Third, the States have *parens patriae* standing to vindicate their quasi-sovereign interest in protecting their citizens from labor-market distortions, such as those caused by granting work authorization to millions of unauthorized aliens.

Moreover, States are due "special solicitude" in the standing analysis. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). The plaintiff States do not need special solicitude to establish standing, but *Massachusetts* makes standing an easy question. To reverse on standing, the Court would have to overrule *Massachusetts*.

II. DAPA is reviewable agency action under the APA.

A. The States are squarely within the zone of interests protected by the statutes the Executive has violated. Defendants' contrary argument was not adopted by a single judge below.

B. DAPA cannot be characterized as inaction. It affirmatively grants lawful presence and eligibility for work authorization, as well as a host of other benefits, to millions of unlawfully present aliens.

The Executive attempts to transform the practice of "deferred action" into something much greater than this Court's conception of it. "[D]eferred action" is the "discretion to abandon" removal proceedings. *AADC*, 525 U.S. at 483-84. Such an exercise of discretion cannot convert an alien's unlawful conduct into lawful conduct. As *AADC* noted, "deportation is necessary in order to bring to an end *an ongoing violation* of United States law." *Id.* at 491.

Nor do immigration statutes commit to agency discretion the power to grant lawful presence, work authorization, and benefits eligiblity to millions of unlawfully present aliens. When the INA delegates

unreviewable discretion to the Executive, it does so clearly: the phrase "sole and unreviewable discretion" appears in many other immigration provisions, but not those at issue here.

III. A. DAPA is unlawful because the Executive exceeded its statutory authority.

The power to establish when aliens are lawfully present is "entrusted exclusively to Congress," which enacted "extensive and complex" statutes governing lawful presence. *Arizona*, 132 S. Ct. at 2499, 2507. Congress has never given the Executive *carte blanche* to grant lawful presence to any alien it chooses not to remove. Congress would have needed to delegate such power "expressly," because this is "a question of deep 'economic and political significance' that is central to [the INA's] statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). After all, DAPA removes eligibility bars for numerous significant benefits—such as Medicare, Social Security, and the Earned Income Tax Credit. Yet Congress in 1996 amended immigration statutes expressly to deny benefits to unlawfully present aliens whom the Executive chooses not to remove. DAPA flouts that congressional directive.

Likewise, Congress did not give the Executive free rein to grant work authorization to any unauthorized alien it chooses not to remove. To the contrary, Congress in 1986 enacted the Immigration Reform and Control Act "as a comprehensive framework for combating the employment of illegal aliens." *Arizona*, 132 S. Ct. at 2504 (quotation marks omitted). Congress has defined numerous categories of aliens that are entitled to or eligible for work authorization. Defendants' approach would render these detailed provisions surplusage.

B. DAPA is also invalid because it was promulgated without APA notice-and-comment procedure. Far from being a general statement of policy, DAPA is a substantive rule.

First, as the district court found based on record evidence, DAPA is a binding rule that eliminates agency officials' discretion. The President compared DAPA to a military order and promised consequences for officials who defied it. DAPA also is based on DACA, and defendants could not identify a single discretionary DACA denial.

Second, even if DAPA allowed discretion, it would still be a substantive rule because it "affect[s] individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). DAPA is necessary to grant lawful presence, work authorization, and benefits eligibility to millions of unlawfully present aliens. As in *Morton v. Ruiz*, DAPA sets legislative-style criteria for which aliens can obtain these significant benefits. 415 U.S. 199, 231 (1974). This change is immensely important to the Nation and requires at least public participation through notice-and-comment procedure.

IV. DAPA also violates the Take Care Clause. It declares conduct that Congress established as unlawful to be lawful. The function of the Take Care Clause is precisely to withhold such an Executive dispensing power.

ARGUMENT

Defendants contest only one of the four preliminary-injunction factors: plaintiffs' likelihood of success on the merits. Br. 18-76. They do not contest the findings that DAPA would cause the plaintiff States to suffer irreparable injury, the balance of equities favors the States,

and the injunction is in the public interest. Pet. App. 396a-403a; *see Winter v. NRDC*, 555 U.S. 7, 20 (2008).

The district court did not abuse its discretion in finding plaintiffs likely to succeed: Plaintiffs have standing, DAPA is reviewable, and DAPA is unlawful.

I. Plaintiffs Have Standing.

A party has Article III standing when it establishes a "personal stake in the outcome of the controversy." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). The plaintiff States submitted multiple declarations detailing the millions of dollars in costs that DAPA will impose on them. These are quintessential Article III concrete injuries that give the States standing under principles applicable to any litigant.

But States are not ordinary litigants; they are due "special solicitude" in the standing analysis. *Massachusetts v. EPA*, 549 U.S. at 520, *quoted in Ariz. State Legislature v. Ariz. Indep. Redist. Comm'n*, 135 S. Ct. 2652, 2664 n.10 (2015). The plaintiff States do not need special solicitude for standing here, but the Court would have to overrule *Massachusetts* to deny their standing.

A. The States Have Standing Based on Driver's-License Costs.

Both courts below correctly found standing because DAPA would cause the States to incur sizable costs issuing a substantial number of new driver's licenses. Pet. App. 20a-21a, 288a. Texas is one example. J.A. 377-82. Other States will incur substantial costs as well, *e.g.*, J.A. 363-64, 432-37, but "one party with standing is sufficient," *Rumsfeld v. FAIR*, 547 U.S. 47, 52 n.2 (2006). Put simply, DAPA will directly cause a flood of new driver's-license applications, and an injunction of DAPA would allow plaintiffs to avoid the unwanted cost of is-

suing those licenses. That easily establishes a personal stake in this case. Pet. App. 20a-33a.

1. Under Texas law predating DAPA, DAPA recipients would become eligible for driver's licenses. Pet. App. 20a-21a; Tex. Transp. Code § 521.142(a).[16] The district court found based on record evidence that (1) at least 500,000 unlawfully present aliens in Texas would be eligible for DAPA, (2) many of them would seek driver's licenses, and (3) Texas would lose over $130 per license. Pet. App. 20a-21a, 31a-32a, 271a-73a, 281a, 285a-86a; *see* J.A. 377-82. Texas therefore would lose millions of dollars if even a small fraction of DAPA-eligible aliens applied for driver's licenses. Pet. App. 21a; J.A. 380. And a portion of these costs would be imposed by federal law. Pet. App. 21a n.58 (citing REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231).

Defendants have not challenged these findings on appeal.[17] Accordingly, they accept that Texas will suffer injury as long as some DAPA beneficiaries apply for

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[16] Contrary to defendants' representations, Br. 25, Texas consistently relies on immigration documents issued or approved by the federal government to establish driver's-license eligibility. Tex. Dep't of Pub. Safety, *U.S. Citizenship or Lawful Presence Requirement*, https://www.dps.texas.gov/DriverLicense/LawfulStatusDLID.htm.

[17] Intervenors criticize the findings based on an extra-record budget document, Intv'r Br. 31-32, but do not claim clear error. In any event, the document does not purport to identify all costs associated with driver's licenses. *See* Tex. Dep't of Pub. Safety, *Operating Budget, Fiscal Year 2014*, at II.A.2 (2013). Furthermore, DAPA would cause a surge of applications, requiring additional hiring and infrastructure. J.A. 379-80. And intervenors do not even attempt to dispute evidence of other plaintiff States' costs. *See* J.A. 363-64, 432-37.

driver's licenses—"and it is apparent that many would do so." Pet. App. 30a. This establishes standing, as "the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List*, 134 S. Ct. at 2341 (quotation marks omitted); *cf. Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138, 1149-50 (2013) (no standing where anticipated harm is only speculative).

2. Defendants unsuccessfully try to escape this conventional standing framework. Br. 20-24. *Lujan v. Defenders of Wildlife* is of no help to them. 504 U.S. 555 (1992). *Lujan* explained that standing is nearly automatic when the plaintiff is the "object of the [government] action." *Id.* at 561. But standing "is not precluded" in all other cases; the plaintiff simply has to "adduce facts" showing that the challenged action will cause others to act in a way that injures the plaintiff. *Id.* at 562; *see Summers v. Earth Island Inst.*, 555 U.S. 488, 493-94 (2009) (under *Lujan*, plaintiffs need only demonstrate that the government action "will affect *them*"). Plaintiffs made precisely that showing here, as the district court found. *See* Pet. App. 178a (noting that "it is hardly speculative" that DAPA beneficiaries will apply for licenses).

Defendants make no more headway with *Linda R.S. v. Richard D.*, which held that a plaintiff "lacks a judicially cognizable interest in the prosecution or nonprosecution of another." 410 U.S. 614, 619 (1973); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (citing *Linda R.S.*). But plaintiffs here are asserting an interest in avoiding financial harm caused by

the Executive's affirmative granting of lawful presence and work authorization.[18]

Finally, defendants put forward what might be called a federal "emanations" bar to standing. Br. 23. This hazily-defined theory—not supported by a single case citation—would apparently bar judicial review whenever the federal government is sued by a State for anything other than direct regulation of that State. Br. 22-23. Case law decisively rejects this theory. 13B Charles A. Wright et al., *Federal Practice & Procedure* § 3531.11.1 & nn.4-5 (3d ed. 2008) (*Fed. Prac. & Proc.*) (collecting cases establishing that, when States sue the federal government, "there is no difficulty in recognizing standing to protect proprietary interests" and "sovereign interests"). If anything, standing to sue the federal government is broader for States than for other litigants. *Massachusetts*, 549 U.S. at 520.

3. Defendants try to dismiss the driver's-license injury as "self-inflicted." Br. 24. But plaintiffs did not manufacture this injury, and the millions of dollars in driver's-license costs are "fairly traceable" to DAPA. *Ariz. State Legislature*, 135 S. Ct. at 2663.

a. Defendants argue that the States lack standing because they can pass on the costs of DAPA to residents by increasing driver's-license fees. Br. 26. But a State can pass on any financial injury in the form of increased taxes or fees. Yet this Court has routinely held that States have standing based on financial injury. *E.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 447-48 (1992);

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[18] Other cases cited by defendants (Br. 20) are even further afield. *DaimlerChrysler Corp. v. Cuno* concerns taxpayer standing. 547 U.S. 332, 342-46 (2006). *O'Bannon v. Town Court Nursing Center* is not a standing case at all and concerns the merits of a due-process claim. 447 U.S. 773, 788 (1980).

Watt v. Energy Action Educ. Found., 454 U.S. 151, 160-61 (1981); *Maryland v. Louisiana*, 451 U.S. 725, 736-37 (1981); *see* Pet. App. 25a.

More generally, plaintiffs can often change their behavior to sidestep a defendant's actions. But that has never negated standing. For example, litigants have established standing based on their desire to fish or observe whales in a particular area. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181-83 (2000); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986). Those plaintiffs could fish elsewhere or observe a different species—but that does not defeat standing. Being forced to make a different and less desirable choice is *itself* a cognizable injury creating a personal stake in the controversy. *See* Pet. App. 24a.

This case illustrates the point. Defendants offer exactly one method of avoiding the injury: namely, increasing the driver's-license fee, either for everyone or for some narrower class. Br. 25-26. As defendants have conceded, States are *obligated* to use federal classifications in judging a driver's-license applicant's authorized presence. Pet. App. 171a n.34 (noting concession); J.A. 308-09; *see* Pet. App. 28a.[19] Defendants thus propose raising fees for all deferred-action recipients, although they pointedly hedge as to whether even this would be legal. Br. 26 (stating that "Texas could seek" to increase these fees); *see Okla. Dep't of Envtl. Quality v. EPA*, 740 F.3d 185, 189-90 (D.C. Cir. 2014) (State's injury not self-inflicted when the federal government "stopped

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[19] That is a crucial distinction from the various examples (such as federal tax, poverty, and disability definitions) used by defendants and intervenors. *Cf.* Br. 32; Intv'r Br. 37-38.

short . . . of stating that Oklahoma would be entitled" to enforce its law without federal interference); *id.* at 190 ("possibility of an alternative remedy, of uncertain availability and effect, does not render [an] injury self-inflicted").[20]

Regardless, the "remedy" defendants propose would itself cause harm. Any of their suggested fee increases would affect some individuals currently entitled to receive $24 driver's licenses. *Compare* Tex. Transp. Code § 521.421 (setting uniform $24 license fee), *with* Pet. App. 272a (break-even fees could be as high as $198.73). Texas policy is to allow those individuals to receive affordable licenses. Defendants just propose Texas should do otherwise.

Such a forced change in Texas law would impair Texas's sovereign interest in "the power to create and enforce a legal code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982). This interest routinely enables States to establish standing based on

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[20] Intervenors expressly maintained that federal law prohibits States from treating deferred-action recipients differently. Intv'r Br. 52-53, *Texas v. United States*, 805 F.3d 653 (5th Cir. 2015) (No. 15-40333). The Executive also previously told the Ninth Circuit that Arizona could not treat deferred-action recipients differently for driver's-license purposes. J.A. 309. And the Ninth Circuit held that the Equal Protection Clause, and likely federal preemption, prevented Arizona from "target[ing] DACA recipients for disparate treatment." *Ariz. DREAM Act Coal. v. Brewer*, 757 F.3d 1053, 1064-65 (9th Cir. 2014). Arizona—a plaintiff in this lawsuit—is bound by a permanent injunction to that effect. 81 F. Supp. 3d 795, 808-11 (D. Ariz. 2015), *appeal pending*, No. 15-15307 (9th Cir. argued July 16, 2015). Additionally, defendants' proposed "substantial, independent state justification" test, Br. 26 n.7, is not part of this Court's preemption doctrine. *Arizona*, 132 S. Ct. at 2501.

preemption of their laws—even though they are free to change those laws. Pet. App. 25a & n.64 (collecting cases); *see Ill. Dep't of Transp. v. Hinson*, 122 F.3d 370, 372 (7th Cir. 1997) (preemption of a state's laws is an "institutional analogue to a restraint on a human being's freedom of locomotion"); Pet. App. 278a. In short, "treating the availability of changing state law as a bar to standing would deprive states of judicial recourse for many *bona fide* harms." Pet. App. 24a-25a.

b. Contrary to defendants' view, the self-inflicted-injury doctrine is narrow and applies only where a plaintiff "manufacture[s] standing." *Clapper*, 133 S. Ct. at 1143. Here, there is "no allegation that Texas passed its driver's license law to manufacture standing." Pet. App. 30a. The "legislature enacted the law one year before DACA and three years before DAPA was announced, and there is no hint that the state anticipated a change in immigration policy." Pet. App. 30a (footnote omitted); *cf. Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 267, 270-71 (4th Cir. 2011) (denying Virginia standing when it legislated—the day after a federal insurance mandate took effect—just to "declare Virginia's opposition to [that] mandate").

There is no plausible argument that the costs imposed by DAPA are "so completely due to the [plaintiffs'] own fault as to break the causal chain." *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989) (quoting 13A *Fed. Prac. & Proc.* § 3531.5); *see Natural Res. Def. Council, Inc. v. FDA*, 710 F.3d 71, 85 (2d Cir. 2013) (no self-inflicted injury where defendant's actions were a "contributing factor" to plaintiff's injuries). Indeed, this Court has found standing under very similar circumstances.

In *Wyoming v. Oklahoma*, Wyoming challenged an Oklahoma statute that required Oklahoma power plants "to burn a mixture of coal containing at least 10% Oklahoma-mined coal." 502 U.S. at 440. The statute depressed coal sales by Wyoming companies, thereby reducing Wyoming's revenues from its tax on coal extraction. *Id.* at 442-45. This Court held that Wyoming's "direct injury in the form of a loss of specific tax revenues" sufficed for standing—even though Wyoming could change its law to increase the tax rate or tax something else. *Id.* at 448.

Defendants' attempt to distinguish *Wyoming* actually highlights its similarity with this case. Contrary to defendants' suggestion, Br. 26, the Oklahoma law did not facially target Wyoming coal—it required Oklahoma plants to use at least 10% Oklahoma coal. 502 U.S. at 440. The law said nothing about Wyoming. *Id.* While it was predictable that Wyoming coal-tax revenues would be "reduced," Br. 26, it is equally predictable that Texas's driver's-license costs would be increased by DAPA.[21] Regardless, whether a defendant intends to "target" a plaintiff says nothing about whether the plaintiff manufactured its injury.

Wyoming decisively refutes defendants' theory. Under their logic, Wyoming's injury was "a self-

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[21] Defendants argue that Wyoming was "the object" of Oklahoma's statute. Br. 27. But the statute only affected Wyoming *through its coal*—much like DAPA affects Texas through its residents. Similarly, defendants suggest that the "causal link" was "forged" by Oklahoma because "Wyoming's tax depended solely on activity in Wyoming." Br. 27. In reality, Wyoming's tax revenues depended on Oklahoma's demand for Wyoming coal. On defendants' view, it is equally true that Texas's driver's-license costs "depend[] solely on activity in" Texas, namely, license applications.

generated effect resulting from its own decision" to tax coal, a link that Wyoming "could eliminate ... at any time." Br. 24. The Court rejected that reasoning in *Wyoming*, as it should here. Pet. App. 28a n.65.

Defendants rely (Br. 25) on *Pennsylvania v. New Jersey*, a case that predates *Wyoming* by over 15 years and is distinguishable. 426 U.S. 660 (1976) (per curiam). *Pennsylvania* held that a State could not "engage this Court's original jurisdiction" to challenge another State's commuter tax on the basis of its own policy of giving tax credits for commuter taxes paid to other States. *Id.* at 663.[22] This was simply an extension of the principle—illustrated by *Massachusetts v. Missouri*, 308 U.S. 1 (1939)—that taxation by one State need not be inconsistent with another, "either in theory or in practical fact." 17 *Fed. Prac. & Proc.* § 4051; *see Missouri*, 308 U.S. at 15, *quoted in Pennsylvania*, 426 U.S. at 663-64.[23] Hence, the special master in *Wyoming* distinguished *Pennsylvania* as limited to tax "reciprocity provisions," and this Court accepted his recommendations on standing. Special Master's Report 14 (No.

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[22] This Court has long approached the exercise of its original jurisdiction as a matter of discretion, including in suits between one State and another. 17 *Fed. Prac. & Proc.* § 4053. And this Court invokes its original jurisdiction "sparing[ly]." *Illinois v. City of Milwaukee*, 406 U.S. 91, 94 (1972). Accordingly, *Pennsylvania*'s refusal to exercise original jurisdiction has limited significance to questions of Article III standing.

[23] *Pennsylvania* also recognized that the constitutional provisions at issue there—the Privileges and Immunities and Equal Protection Clauses—"protect people, not States," 426 U.S. at 665, implying that original jurisdiction would exist for Pennsylvania to vindicate rights not specifically possessed by individuals.

112), 1990 WL 10561260; *Wyoming*, 502 U.S. at 442, 454.

Unlike in *Pennsylvania*, plaintiffs here (and in *Wyoming*) "cannot both change their laws to avoid injury from amendments to another sovereign's laws *and* achieve their policy goals." Pet. App. 28a n.65. Accordingly, the driver's-license injury cannot be self-inflicted.

B. The States Have Standing Based on Education, Healthcare, and Law-Enforcement Costs.

1. DAPA will impose significant education, healthcare, and law-enforcement costs on plaintiffs because it will cause additional aliens to remain in the country and consume these costly services. The court of appeals had no need to reach this issue, Pet. App. 11a, but the district court made all the fact findings necessary to affirm standing on this independent basis. *See J.E. Riley Inv. Co. v. Comm'r*, 311 U.S. 55, 59 (1940).

The district court found that unlawfully present aliens impose substantial education, healthcare, and law-enforcement costs on plaintiffs. In particular, the record revealed that Texas pays at least $7,903 annually for each unlawfully present alien enrolled in public school. Pet. App. 301a & n.36; *see* J.A. 327. In a single year, "Texas absorbed additional education costs of at least $58,531,100 stemming from illegal immigration." Pet. App. 301a; *see* J.A. 327-28. And States are required to bear this cost under *Plyler v. Doe*, 457 U.S. 202 (1982). The district court also found that Texas spends hundreds of millions of dollars per year on "uncompensated medical care" for unlawfully present aliens. Pet. App. 302a; *see* J.A. 299. Finally, the record showed "significant law enforcement costs." Pet. App. 298a; *see* J.A. 321-24. None of these costs are limited to Texas—"other states are also affected." Pet. App. 302a.

Defendants and intervenors have never challenged these costs or suggested plaintiffs could somehow avoid them. *See* Pet. App. 304a, 309a n.39. And this Court has repeatedly recognized that States incur significant costs from unlawful immigration. *E.g.*, *Arizona*, 132 S. Ct. at 2500 ("The problems posed to the State by illegal immigration must not be underestimated."); *De Canas v. Bica*, 424 U.S. 351, 357 (1976).

The States will be injured if DAPA causes more aliens to demand these costly services. And the district court, relying on an expert demographer's declaration, found that precisely this would occur. Pet. App. 311a ("The States rightfully point out that DAPA will increase their damages with respect to [these services] because it will increase the number of individuals that demand them."); J.A. 332-53. Specifically, unlawfully present aliens who would have left the country without DAPA would choose to stay as a result of DAPA—and therefore impose significant education, healthcare, and law-enforcement costs only because of DAPA. Pet. App. 311a-12a.

This finding makes perfect sense: By furnishing lawful presence and allowing valuable benefits and work authorization, DAPA eliminates multiple mechanisms Congress created to deter unlawful presence and thus encourages unauthorized aliens to remain. *See supra* pp.4-8, 11-13. The Executive itself has noted that DAPA will reduce emigration by almost 400,000 people by 2050.[24] This causal chain is far more direct than those in

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[24] Letter from Stephen C. Goss, Chief Actuary, Soc. Sec. Admin. 3 (Feb. 2, 2015), https://www.ssa.gov/OACT/solvency/BObama_20150202.pdf. The district court also found that DAPA would cause certain aliens not to be removed. Pet.

other cases where this Court found standing. *E.g.*, *Watt*, 454 U.S. at 160-62; *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 72-81 (1978).

2. While defendants call this plaintiffs' "principal" standing theory, they offer virtually no response to it. Br. 22; *see* Intv'r Br. 29 n.1 (also not responding in any depth). The district court declined to endorse this basis for standing for only one reason: the possibility that DAPA's costs to the States might be *offset* by its benefits. Pet. App. 313a. But neither defendants nor intervenors have renewed that argument in their briefs.[25] Rightly so. As the Fifth Circuit explained, this standing "offset" theory is fatally flawed. Pet. App. 22a-23a.

Most importantly, "standing analysis is not an accounting exercise." *NCAA v. Gov. of N.J.*, 730 F.3d 208, 223 (3d Cir. 2013). The question is whether the plaintiff has a personal stake in the controversy. "Once injury is shown, no attempt is made to ask whether the injury is outweighed by benefits"; it is enough "that some particular aspect of the relationship is unlawful and has caused injury." 13A *Fed. Prac. & Proc.* § 3531.4 (collecting cases).

Any other approach would turn the threshold standing inquiry into an unmoored and unmanageable exercise. In *Massachusetts*, for example, the Court would have needed to ask whether the harms to Massachusetts could be offset by the various possible benefits of a warmer climate (such as increased tourism) and a laxer

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App. 311a-12a. And plaintiffs introduced evidence that DAPA would cause additional unlawful immigration. J.A. 334-47.

[25] Intervenors offer a version of the offset theory with respect to plaintiffs' *driver's-license* costs. Intv'r Br. 32-34. It fails for the reasons discussed in this section.

regulatory regime (such as cheaper cars). And in *Wyoming*, Oklahoma could have argued that Wyoming's lost taxes could be offset by greater dealings with Oklahoma's resurgent coal industry. Unsurprisingly, courts have consistently rejected such an unwieldy approach.[26] Pet. App. 22a n.59 (collecting cases).

The offset argument has a second flaw. As the district court acknowledged, any purported offsetting benefits here are "speculative." Pet. App. 313a. "This Court, with the record before it, has no empirical way to evaluate the accuracy of [defendants'] economic projections." *Id.*[27]

C. The States Have *Parens Patriae* Standing.

A State has *parens patriae* standing to protect its quasi-sovereign interest in "the health and well-being of its residents," including their "economic and commercial interests." *Snapp*, 458 U.S. at 609. Accordingly,

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[26] An offset analysis is only appropriate, if ever, when the alleged benefits "are of the same type and arise from the same transaction as the costs." Pet. App. 22a. Here, the proffered offsetting benefits included "the productivity of the DAPA recipients and the economic benefits that the States will reap by virtue of these individuals working, paying taxes, and contributing to the community." Pet. App. 313a. Such benefits cannot plausibly offset standing, as they are neither of the same type, nor part of the same transaction, as the complained-of costs. *See* Pet. App. 23a.

[27] As to driver's licenses, intervenors belatedly attempt to articulate offsetting benefits more concretely. Intv'r Br. 33-34. But they rely entirely on sources outside of the record, which cannot be considered now. *E.g.*, *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970). Regardless, their argument rests on speculation about the extent of the putative offset—and ignores costs imposed by the putative offsetting activities themselves.

Puerto Rico had standing to protect its residents from labor-market discrimination. *Id.* at 608-09.

DAPA subjects the plaintiff States' citizens to the same sort of labor-market distortions, by granting eligibility for work authorization to millions of aliens. *See supra* p.11; *e.g.*, *De Canas*, 424 U.S. at 356; *cf.* Br. 22 n.5.[28] Defendants acknowledged that competitor standing to challenge DAPA might be available to individual citizens. Oral Arg. at 0:06:40-0:07:10, 0:07:55-0:08:19, No. 15-40238 (5th Cir. Apr. 17, 2015). For the same reason, *parens patriae* standing is available to the States.

Nothing bars such a *parens patriae* action against the federal government. *Cf.* Br. 23 n.6. *Massachusetts v. Mellon*, 262 U.S. 447 (1923), addresses only suits seeking to protect citizens "*from* the operation of [federal] statutes." *Id.* at 485 (emphasis added). In contrast, plaintiffs seek to *enforce* federal statutes "to assure [their] residents that they will have the full benefit of federal laws designed to address this problem." *Snapp*, 458 U.S. at 609-10. Moreover, "*Mellon* itself disavowed any such broad reading" by making it explicit that no quasi-sovereign interests were at stake there. *Massachusetts v. EPA*, 549 U.S. at 520 n.17.

D. States Receive Special Solicitude in the Standing Analysis.

Massachusetts v. EPA accorded States "special solicitude" in the standing inquiry, recognizing "that States are not normal litigants for the purposes of invoking federal jurisdiction." *Id.* at 518, 520. The plaintiff

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[28] Federal law also would make it cheaper to hire a DAPA recipient since the health-insurance "employer mandate" penalties would not apply. J.A. 438-47; *see* 8 U.S.C. § 1611(a); 26 U.S.C. § 4980H(b).

States here are entitled to the same. Pet. App. 12a-20a. In fact, the causal chain between DAPA and plaintiffs' injuries is much clearer than in *Massachusetts*. Pet. App. 30a.

Special solicitude is especially crucial where unilateral Executive action vitiates the States' key protection in the federal constitutional structure—representation in Congress. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985) ("[I]nherent in all congressional action [are] the built-in restraints that our system provides through state participation in federal government action. The political process ensures that laws that unduly burden the States will not be promulgated."). That is true here. Federal statutes preempt the States' power to determine who may be present and work within their borders. *Arizona*, 132 S. Ct. at 2507. "These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered [the Executive] to protect [the States]," *Massachusetts*, 549 U.S. at 519, by following statutes that carefully detail who may be present and work in this country.

It is particularly ironic for defendants to complain that this lawsuit bypasses "the political process." Br. 33. The very point of this lawsuit is that the Executive circumvented the political process by usurping Congress's legislative role and refusing to follow statutory requirements. DAPA's exercise of unilateral Executive power pretermitted a "searching, thoughtful, rational civic discourse" on the issue. *Arizona*, 132 S. Ct. at 2510.

Defendants argue that Massachusetts's injury "was not self-generated." Br. 14. But this is simply a rehash of their self-inflicted-injury argument, *supra* pp.21-27—which was not even raised as to plaintiffs' education,

healthcare, and law-enforcement costs or their standing as *parens patriae*.

Defendants state that *Massachusetts* involved a rulemaking petition. Br. 29. But they do not explain what that has to do with special solicitude, particularly when this lawsuit also demands the Executive at least follow statutorily required procedures. *See infra* Part III.B. Those procedures are of course required by the APA, not the Clean Air Act. But *Massachusetts*'s recognition of special solicitude did not turn on the procedural right being topic-specific or held only by States. *See* 549 U.S. at 537 (Roberts, C.J., dissenting) (the right "treated public and private litigants exactly the same"). Rather, States have special solicitude because they "are not relegated to the role of mere provinces or political corporations, but retain the dignity ... of sovereignty." *Alden v. Maine*, 527 U.S. 706, 715 (1999), *quoted in Massachusetts*, 549 U.S. at 519.

Defendants note that the plaintiff States are not asserting an interest in land boundaries, as Massachusetts did. Br. 29-30. But *Massachusetts* made clear that States can establish standing based on *all* quasi-sovereign or proprietary interests—not just issues "involving boundaries and jurisdiction over lands and their inhabitants." 549 U.S. at 520 n.17 (quoting *Missouri v. Illinois*, 180 U.S. 208, 240-41 (1901)). Plaintiffs have asserted a variety of proprietary and quasi-sovereign interests. *See supra* pp.18-31. And States have an "easily identified" interest in "the exercise of sovereign power over individuals and entities within the relevant jurisdiction." *Snapp*, 458 U.S. at 601. As in *Arizona State Legislature*, plaintiffs here are "institutional plaintiff[s] asserting an institutional injury"—in addition to financial injuries. 135 S. Ct. at 2664; *see* Pet. App. 18a. Plain-

tiffs challenge Executive action dispensing with statutes that preempt the States' ability to regulate. *See* Pet. App. 315a-30a; *infra* Part IV.

Defendants' suggestion that States are *less* likely to have standing than ordinary plaintiffs is thus precisely backwards. Br. 20-21. To deny standing here, the Court would need to overrule *Massachusetts* and reject special solicitude for States in the standing analysis.

E. Defendants' Theory of Standing Has Unacceptable Consequences.

1. Defendants and intervenors make a last-ditch effort to undercut standing by arguing that a flood of litigation will ensue if the States have standing here. Br. 31-33; Intv'r Br. 35-39. That is unpersuasive for many reasons.

First, a plaintiff always must satisfy standing's injury-in-fact and causation requirements. Pet. App. 34a ("standing requirements would preclude much of the litigation the government describes"). Intervenors postulate that States could challenge "grants of deferred action to single individuals," Intv'r Br. 36, but demonstrating costs traceable to an individual grant of deferred action would be much more difficult. Nor would a plaintiff have standing simply by virtue of "fil[ing] a declaration claiming some impact to its budget." Intv'r Br. 38. Evidence can be contested, and a plaintiff can be put to its proof, as were the States here. Most litigants, moreover, will not possess special solicitude in the standing analysis. Pet. App. 35a.

Second, litigants with standing still need a cause of action. The APA imposes a number of relevant limitations. Courts apply a zone-of-interest test, Pet. App. 34a, and the APA also bars review where precluded by statute or the matter is committed to agency discretion,

5 U.S.C. § 701(a). That is true for many immigration decisions not at issue here, which are committed to the "sole and unreviewable discretion" of the Executive. *See infra* pp.42-43. Finally, "numerous policies that adversely affect states either are not rules at all or are exempt from the notice-and-comment requirements." Pet. App. 34a; *see infra* pp.68-69.

Third, claims ultimately must have merit. Intervenors apparently believe that, simply by virtue of having standing, a plaintiff would be able to "paralyze immigration enforcement" or "block ... Executive decisions to target low-priority immigrants for removal." Intv'r Br. 35, 36 (capitalization modified). But plaintiffs have not challenged the Executive's separate memorandum establishing categories of aliens prioritized for removal. *See supra* p.10. And plaintiffs obtained an injunction against DAPA only by demonstrating, among other things, a likelihood of success on the merits.

As this Court observed in response to another parade of horribles, "[t]here will be time enough to address ... other circumstances if and when they arise." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012). Here, plaintiff States have shown a personal stake in DAPA's legality.

2. The genuinely unacceptable consequences would follow from defendants' view of standing. It is aggressive enough to insist that States—which possess the dignity of sovereignty—are powerless to challenge DAPA's legality. But defendants go further. At several points, they make clear that they believe *nobody* can challenge DAPA. *See* Br. 12 (no role for "federal courts"); Br. 21 (same); Br. 33 ("courts are not the appropriate forums for resolving such a disagreement").

That is a remarkable position. Under defendants' view, the Executive would be free to effect a fundamental and unlawful shift in this Nation's approach to immigration—by unilaterally declaring unlawful conduct to be lawful and giving valuable benefits to millions of unauthorized recipients—and there would be *no* judicial check on this action. On that view, it is hard to see what would stop the Executive from granting millions of aliens lawful permanent residency or even citizenship.

DAPA poses profound statutory and constitutional questions. Even the Executive's own Office of Legal Counsel (OLC) acknowledged that such a program "must be carefully scrutinized to ensure that . . . it does not seek to effectively rewrite the laws." J.A. 83. Defendants' insistence that the Court is not entitled to provide this much-needed scrutiny, Br. 74 n.17, reflects a cramped and insupportable conception of the Judiciary's role. *See infra* pp.76-77.

II. DAPA Is Reviewable Under the Administrative Procedure Act.

DAPA is reviewable agency action. "Congress's evident intent when enacting the APA [was] to make agency action presumptively reviewable." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quotation marks omitted). That presumption is even stronger here, where APA review would allow this Court to avoid serious constitutional issues under the Take Care Clause. *See infra* Part IV; *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 197 (2009) ("Our usual practice is to avoid the unnecessary resolution of constitutional questions.").

A. The States' Interests Are Protected by the Statutes the Executive Violated.

No judge below accepted defendants' argument (Br. 33-36) that plaintiffs fail the APA zone-of-interests test. *See* Pet. App. 36a-38a. This test "is not 'especially demanding.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014) (quoting *Patchak*, 132 S. Ct. at 2210). Plaintiffs must show only that their interests are "arguably within the zone of interests to be protected or regulated by the statute" that the plaintiff contends was violated. *Patchak*, 132 S. Ct. at 2210 ("the benefit of any doubt goes to the plaintiff").

The Fifth Circuit correctly held that "[t]he interests the states seek to protect fall within the zone of interests of the INA." Pet. App. 37a. As illustrated above, *supra* pp.18-34, the States "bear[] many of the consequences of unlawful immigration," which is why this Court recognized "the importance of immigration policy to the States." *Arizona*, 132 S. Ct. at 2500. The States must rely on Congress and the INA, however, to regulate which aliens may be present and work in their borders. *See id.* at 2498-99. With IRCA in 1986, Congress amended the INA to create additional deterrence of unlawful labor-market distortion—a "primary purpose" of immigration law. *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 (1991). Congress then reinforced immigration laws in 1996 with IIRIRA and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), responding to State concerns about effects of extending benefits to unlawfully present aliens. *E.g.*, 142 Cong. Rec. 26,680 (1996) (statement of Sen. Kyl) ("With this immigration bill, we have the opportunity to lift this financial burden off the

States by forcing the Federal Government to take responsibility for reducing illegal immigration . . . .").

The States are also within the zone of interests of 5 U.S.C. § 553, the APA notice-and-comment statute. As *Arizona* recognized, "Consultation between federal and state officials is an important feature of the immigration system." 132 S. Ct. at 2508. DAPA will have significant consequences for the States. *See supra* pp.18-34. So they are certainly "aggrieved," 5 U.S.C. § 702, by an inability to receive notice of, and comment on, one of the largest changes in our Nation's approach to immigration. Pet. App. 15a; *cf.* Br. 35.

B. Congress Did Not Give the Executive Unreviewable Discretion to Create DAPA.

Defendants wrongly argue that DAPA was "committed to agency discretion by law," 5 U.S.C. § 701(a)(2). Br. 36-41. This exception to APA judicial review is "very narrow." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Defendants do not come close to rebutting the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (quotation marks omitted).

1. a. DAPA is not shielded from review by *Heckler*. *Heckler*'s presumption of unreviewability applies only to "an agency's refusal to take . . . action," such as "an agency's decision not to take enforcement action." 470 U.S. at 831, 832. *Heckler* thus held that a plaintiff could not use the APA to force the Food and Drug Administration to take enforcement actions related to lethal-injection drugs. *Id.* at 827; *accord INS v. Legalization Assistance Proj.*, 510 U.S. 1301, 1302-03 (1993) (O'Connor, J., in chambers) (staying order requiring the Executive to *act* by considering certain applications). In

contrast, "when an agency *does* act," the "action itself provides a focus for judicial review" and "can be reviewed to determine whether the agency exceeded its statutory powers." *Heckler*, 470 U.S. at 832.

DAPA is clearly reviewable under this framework because it creates a massive bureaucracy to grant applicants lawful presence, related benefits eligibility, and work authorization. Pet. App. 413a, 417a-18a; *see also* J.A. 773-74 (DAPA would cost federal government over $324 million to implement). This is affirmative governmental action. Pet. App. 43a-48a. Conversely, the preliminary injunction does not affect the Executive's enforcement discretion. It does not require the Executive to remove anyone, and it does not touch the removal-prioritization memorandum. Pet. App. 51a, 331a-35a, 405a. The Executive has been free all along to issue "low-priority" identification cards to aliens, as it admitted in district court. 2015 WL 1540022, at *7; *see* J.A. 714-16.

DAPA's granting of lawful presence and eligibility for valuable work authorization and benefits forecloses the Executive's reliance on *Heckler*.[29] As defendants' counsel acknowledged below, DAPA "works in a way that's different than ... prosecutorial discretion" because it grants inducements "for people to come out and identify themselves." J.A. 716.

b. Defendants try to explain away the granting of lawful presence by obscuring its meaning. According to them:

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[29] Even if *Heckler*'s unreviewability presumption somehow applied, it would be rebutted because the Executive has "abdicat[ed]" its responsibility to enforce Congress's immigration statutes as to DAPA recipients. 470 U.S. at 833 n.4; *see infra* Parts III.A, IV.

> Insofar as deferred action itself is concerned, "lawful presence" *simply describes the result of notifying an alien* that DHS has made a non-binding decision to forbear from pursuing his removal for a period of time ....

Br. 37 (emphasis added); *see* Intv'r Br. 42.

Just like another argument made by the Executive in a recent immigration case, this is "contrary to common sense" and has "no basis in law, fact, or logic." *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1979 (2011). The words "lawful presence" are not meaningless: they deem the unlawful conduct of millions of aliens to be lawful, placing aliens in a legal status with significant consequences. *See supra* pp.2-6.[30]

Presumably, that is why the President candidly admitted that DAPA recipients would get "a legal status," *see supra* p.13, and the Executive previously told the Ninth Circuit that DACA "deferred action status" is "lawful status," J.A. 316. Even the Executive's own benefits regulations have established a "deferred action status." 8 C.F.R. § 1.3(a)(4)(vi); 45 C.F.R. § 152.2(4)(vi).

DAPA's lawful presence may not be an immigration classification that allows an alien to adjust to LPR status—although the Executive has apparently granted LPR status, and thus a pathway to citizenship, to aliens eligible for advance parole only because of DACA. *See*

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[30] Viewing DAPA's granting of lawful presence as inaction because other statutes provide consequences for lawful presence makes no more sense than viewing the granting of marriage licenses as inaction because the tax consequences and other benefits of marriage are prescribed in separate statutes and regulations. *Cf.* U.S. Amicus Br. 13-14, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1004710 ("Marriage is the gateway to a vast array of governmental benefits.").

supra pp.12-13 & n.14. Regardless, lawful presence is a meaningful immigration classification established by Congress. *See supra* pp.2-6. Certain nonimmigrant statuses also do not allow adjustment to LPR status, 8 U.S.C. § 1255(c)(1), (3)-(5), but granting them is still action as opposed to inaction. *Cf. Chaudhry v. Holder*, 705 F.3d 289, 292 (7th Cir. 2013) (discussing what predicate status is necessary to adjust to LPR status under 8 U.S.C. § 1255).

Nor does it matter that DAPA can be "revoke[d]." Br. 38. An alien is still deemed lawfully present—and thus eligible for valuable benefits—until any revocation. Pet. App. 413a. Visas too are revocable at any time in the Executive's discretion. 8 U.S.C. § 1201(i). But the Executive plainly acts by issuing a visa, and the alien is lawfully present while holding one.

DAPA's granting of lawful presence pushes the concept of deferred action far beyond what this Court has recognized. "[D]eferred action" is merely the "discretion to abandon" the "initiation or prosecution of various stages in the deportation process." *AADC*, 525 U.S. at 483-84. But a decision not to initiate enforcement action cannot transform unlawful conduct into lawful conduct. *See, e.g., United States v. Orellana*, 405 F.3d 360, 370 (5th Cir. 2005) ("[A] temporary stay of removal does not render an otherwise illegal alien's presence lawful."). As *AADC* recognized, an alien's unlawful presence is "*an ongoing violation* of United States law," even though the Executive has discretion to forbear from removal in certain circumstances. 525 U.S. at 491; *cf.* Br. 38.

A former INS General Counsel similarly observed that "when we do not intend or are unable to enforce the alien's departure," that "doesn't make his illegal

stay here any less illegal." Sam Bernsen, *Leave to Labor*, 52 No. 35 Interpreter Releases 291, 294-95 (Sept. 2, 1975).[31] The same is true in other contexts. For example, when a prosecutor decides not to prosecute low-level drug possession, petty theft, or failure to register for the draft, that does not render such conduct *lawful*. *Cf.* Br. 38-39, 70-71.

In short, DAPA cannot be "an exercise of [the Executive's] enforcement discretion" because "it purports to *alter* [INA] requirements" and pronounce "that otherwise-prohibited conduct will not violate the Act." *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014) (*UARG*).

2. Even assuming Congress gave the Executive substantive authority to grant aliens the lawful presence and benefits at issue here, *but see infra* Part III.A (explaining why Congress made no such delegation), that still does not show that DAPA is *unreviewable*. *See Mach Mining*, 135 S. Ct. at 1651 (Congress "rarely intends" to make the exercise of delegated power unreviewable under the APA); *cf.* Br. 39.

When Congress intends to create unreviewable power, it uses clear language such as "sole and unreviewable discretion." That phrase appears multiple times in immigration statutes,[32] *see* Pet. App. 40a, including a separate provision regarding community services that

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[31] As recently as 2006, the Executive acknowledged that "[d]eferred action .... does not affect periods of unlawful presence." USICE, *Detention and Deportation Officer's Field Manual* § 20.8(a) (Mar. 27, 2006) (*Field Manual*), https://www.ice.gov/doclib/foia/dro_policy_memos/09684drofieldpolicymanual.pdf.

[32] *E.g.*, 8 U.S.C. §§ 1154(a)(1)(A)(viii)(I), (B)(i)(I), 1182(a)(10)(C)(ii)(III), (iii)(II), 1225(b)(1)(A)(iii)(I), 1613(c)(2)(G), 1621(b)(4), 1641(c).

appears immediately before the benefits-eligibility statutes invoked by defendants. 8 U.S.C. § 1611(b)(1)(D). The INA lists over 30 additional determinations to be made in the Executive's "discretion" or "opinion."[33] Yet none of the provisions upon which defendants rely here mention "discretion," much less "unreviewable discretion." *See* Pet. App. 40a.

Additionally, unchecked power to grant work authorization and benefits to millions of aliens would be completely contrary to Congress's "legislative mandate." *Mach Mining*, 135 S. Ct. at 1651. The Executive suggests that there are "no meaningful standards against which to judge the agency's exercise of discretion." Br. 40; *see* Br. 41. But the APA requires at least notice and comment. *See infra* Part III.B. And, substantively, Congress established intricate statutes delineating which aliens can be present and work in the country. *See supra* pp.2-4, 6-8. The Executive's claim that Congress gave it a standardless power to depart from that intricate scheme founders not only on the statutory text, *see infra* Part III.A, but on the canon of constitutional avoidance: a delegation of legislative power without even an "intelligible principle" cabining its exercise would be unconstitutional. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001).

3. Lastly, defendants cite IIRIRA's jurisdiction-stripping provision, which is inapplicable. Br. 41; *see* Pet. App. 39a-40a. Plaintiffs are not raising claims "by or on behalf of any alien," nor are they challenging any decision or action "to commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C.

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[33] *E.g.*, 8 U.S.C. §§ 1157(c)(1), 1159(b), 1182(d)(3)(A), (5)(A), 1184(d)(2)(B), 1201(i), 1255(j)(1), (*l*)(1), (m)(1)(B).

§ 1252(g); *see AADC*, 525 U.S. at 482 (noting that § 1252(g) "applies only to three discrete actions"). Plaintiffs challenge DAPA's affirmative granting of lawful presence and eligibility for employment and benefits.

Defendants ultimately suggest that § 1252(g) implies some "structure" of the INA that silently strips federal courts' jurisdiction to hear this lawsuit. Br. 41. This resort to alleged implications only confirms that there is no "clear and convincing evidence of legislative intention to preclude review." *Japan Whaling*, 478 U.S. at 230 n.4.

III. DAPA Violates the Administrative Procedure Act.

DAPA violates the APA because it is contrary to law, 5 U.S.C. § 706(2)(A)-(C), and was issued without required notice-and-comment procedure, *id.* § 553.

A. DAPA Is Contrary to Law.

Given DAPA's monumental scope and consequences, one would expect to find express congressional authorization for it. But no such delegation exists. In fact, DAPA conflicts with and undermines Congress's comprehensive immigration statutes. Pet. App. 69a-86a.

No deference is due to the Executive's statutory interpretation. *Cf.* Br. 43. Whether to permit millions of aliens to be lawfully present and work in this country is "a question of deep 'economic and political significance' that is central to [the INA's] statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly." *King*, 135 S. Ct. at 2489 (quoting *UARG*, 134 S. Ct. at 2444); *accord Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) ("The idea that Congress gave the [Executive] such broad and unusual authority through an implicit delegation . . . is not sustainable.").

1. DAPA contravenes statutes defining lawful presence and its consequences.

a. Congress enacted "extensive and complex" statutory provisions governing when aliens may be lawfully present in the country. *Arizona*, 132 S. Ct. at 2499. It never delegated the power asserted by the Executive in DAPA—to permit aliens "to be lawfully present" whenever it forbears from removal. Pet. App. 413a. When Congress allows aliens to be lawfully present, it identifies these "specified categories of aliens" in statutes. *Arizona*, 132 S. Ct. at 2499. Congress has done so for over 40 classes of nonimmigrants, asylees, refugees, and many other aliens. *See* Pet. App. 71a-72a; *supra* pp.2-4.

Defendants rely on 8 U.S.C. § 1103(a) and 6 U.S.C. § 202(5), Br. 42, but neither delegates authority to deem aliens lawfully present when Congress has not. The former is simply a provision from the original INA that generically charges the Executive with enforcing the Act. *See* 8 U.S.C. § 1103(a)(1) (charged "with the administration and enforcement of [the INA]"); *id.* § 1103(a)(3) (grant of power to "perform such other acts as he deems necessary for carrying out his authority under the provisions of [the INA]"). And the latter grants power to "[e]stablish[] na onal immigration enforcement policies and priorities," 6 U.S.C. § 202(5), like the prioritization memo not challenged here, Pet. App. 420a-29a.

Nor can congressional appropriations waive or expand INA provisions. *Cf.* Br. 3-4, 44. Practical constraints on one enforcement mechanism have never justified declaring unlawful conduct to be lawful. *See AADC*, 525 U.S. at 491 (prosecutorial discretion cannot cure alien's "*ongoing violation* of United States law").

Defendants cite the fact that some unlawfully present aliens "will continue living and working here." Br. 42. But this is no basis for granting *lawful presence*. Pet. App. 72a-74a. To the contrary, the statutory consequences of unlawful presence are meant to discourage aliens from unlawfully "living and working here," Br. 42. *See, e.g.*, *Arizona*, 132 S. Ct. at 2504; *Hoffman*, 535 U.S. at 147; *Mendoza v. Perez*, 754 F.3d 1002, 1017 (D.C. Cir. 2014) (INA "protect[s] American workers from the deleterious effects the employment of foreign labor might have on domestic wages and working conditions").

Defendants frequently mention family unity as a justification for DAPA. *See* Br. 42, 45-46, 62. But their theory of Executive power extends to *any* instance of forbearance from removal, not just forbearance for family-unity reasons. Regardless, Congress drastically limited when family unity can serve as a basis for obtaining lawful presence and work authorization. Congress created no mechanism for parents to obtain lawful presence on account of having an LPR child. And it established high hurdles—which typically include waiting decades and leaving the country for ten years—to obtain lawful presence when a child becomes an adult citizen. *See* Pet. App. 71a-74a; *supra* p.4.

Defendants note that an immigration judge "may grant lawful permanent residence" for parents of under-21 citizen children in "certain circumstances." Br. 46. But this refers to cancellation-of-removal relief, which is exceedingly limited: it requires ten years' continuous presence in the country plus "exceptional and extremely unusual hardship" to a U.S. citizen spouse, child, or parent—and even then, cancellation of removal

is limited to 4,000 recipients annually. 8 U.S.C. § 1229b(b)(1)(A), (D), (e)(1).

Congress thus balanced family-unity goals with other considerations, such as deterring unlawful immigration and "preserv[ing] jobs for American workers." *Sure-Tan*, 467 U.S. at 893. "[F]amily unity" objectives "are not the INA's only goals, and Congress did not pursue them to the *n*th degree." *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2019 (2012).

The Executive's arguments, Br. 45-47, reflect its view that Congress should amend immigration statutes to achieve the Executive's preferred policy outcomes. But the Executive's belief that immigration statutes have "turn[ed] out not to work in practice" does not grant it "a power to revise clear statutory terms." *UARG*, 134 S. Ct. at 2446.

b. DAPA directly flouts Congress's 1996 decision to eliminate most federal benefits for unlawfully present aliens whom the Executive had not yet removed.

Congress introduced "lawful presence" into the INA in 1996. Before then, certain statutes permitted benefits for aliens "permanently residing in the United States under color of law" (PRUCOL).[34] Some courts interpreted this PRUCOL "status" as covering—and thus granting benefit eligibility to—unlawfully present aliens whom the Executive was forbearing from removing. *See Lewis v. Thompson*, 252 F.3d 567, 571-72 (2d Cir. 2001) (citing *Berger v. Heckler*, 771 F.2d 1556,

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[34] *E.g.*, Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9406(a), 100 Stat. 1874, 2057 (amending 42 U.S.C. § 1396b(v)(1)) (prohibiting nonemergency Medicaid payments for aliens "not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law").

1575-76 (2d Cir. 1985)); *Smart v. Shalala*, 9 F.3d 921, 923 (11th Cir. 1993) (per curiam). The Second Circuit described PRUCOL status as including "aliens who, although unlawfully residing in the United States, are each individually covered by a letter . . . stating that the [INS] 'does not contemplate enforcing . . . [the alien's] departure from the United States at this time.'" *Berger*, 771 F.2d at 1575-76 (quoting *Holley v. Lavine*, 553 F.2d 845, 849 (2d Cir. 1977)) (alterations in original).

In 1996, Congress eliminated most benefits for these aliens. It did so in part by enacting welfare-reform legislation (PRWORA), which replaced PRUCOL status with "lawful presence" as the immigration classification triggering eligibility for specified benefits. The legislative history expressly directed that "[p]ersons residing under color of law shall be considered to be aliens *unlawfully present* in the United States." H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2771 (emphasis added). Congress thus "impos[ed] sweeping restrictions on aliens' access to federally sponsored government aid," *Lewis*, 252 F.3d at 577, to help curb unlawful immigration.[35]

As relevant here, Congress required aliens to be "lawfully present in the United States as determined by the Attorney General" to obtain Social Security, Medicare, and another retirement benefit. 8 U.S.C. § 1611(b)(2)-(4). Those provisions direct which official

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[35] *See, e.g.*, H.R. Rep. No. 104-651, at 1451 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2510 ("[M]aking . . . PRUCOL aliens . . . ineligible for public benefits will reduce the incentive for aliens to illegally enter and remain in the U.S."); H.R. Rep. No. 104-725, at 379-83, 390, *reprinted in* 1996 U.S.C.C.A.N. at 2767-71, 2778; 142 Cong. Rec. 20,953 (1996) (statement of Sen. Shelby); 142 Cong. Rec. 17,859 (1996) (statement of Rep. Hoke).

has the ministerial duty to examine statutory criteria and determine a given alien's federal benefits eligibility (now the DHS Secretary rather than, for example, the Labor or HHS Secretary). But the express trigger is lawful presence, and extensive statutory criteria define when presence is lawful. *See supra* pp.2-4. These provisions do not mention discretion, much less unreviewable power to deem any alien in the country lawfully present. *Cf.* Br. 40-41. Nor does anything in the legislative history suggest as much.[36]

DAPA would accomplish precisely what Congress prohibited in 1996: granting benefits to unlawfully present aliens whom the Executive forbears from removing. And the Executive wants to do this for millions of aliens—far more than the "minuscule" number of removable PRUCOL aliens animating the 1996 reforms. *See Berger*, 771 F.2d at 1575. That is Executive overreach, manifestly contrary to law.

c. Another consequence of unlawful presence is IIRIRA's reentry bar, triggered after six months of unlawful presence and lengthened after twelve months of unlawful presence. 8 U.S.C. § 1182(a)(9)(B)(i). The reentry-bar clock does not run until an alien reaches age 18, *id.* § 1182(a)(9)(B)(iii)(I), meaning that the maximum bar cannot be reached until age 19. *Cf.* Br. 41 n.8 (wrongly calling this bar "largely irrelevant," when it affects all expanded-DACA and DAPA recipients under age 19).

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[36] The legislative history expressly states that these benefits pertain to "work for which a *nonimmigrant* has been *authorized to enter* the U.S.," not work by aliens who intend to remain in the country unlawfully. H.R. Rep. No. 104-651, at 1442, 1996 U.S.C.C.A.N. at 2501 (emphases added).

DAPA purports to stop the reentry-bar clock by deeming recipients lawfully present. Pet. App. 44a n.99; *see* J.A. 63.[37] This is also contrary to law. The reentry-bar clock runs during all periods of "unlawful presence," with certain statutory exceptions not relevant here. "Unlawful presence" is defined as an alien's presence in the United States "after the expiration of the period of stay authorized by the Attorney General *or* presen[ce] in the United States *without being admitted or paroled.*" 8 U.S.C. § 1182(a)(9)(B)(ii) (emphases added). The disjunctive second clause triggers the reentry-bar clock for aliens who have not been admitted or paroled.

Defendants assert the power to toll the reentry-bar clock by unilaterally declaring an alien to be in a "period of stay." Br. 9 n.3; *see* Br. 41 n.8, 68 n.16. But this ignores the second clause. There is no statutory authority to admit or parole an alien into the country just because the Executive forbears from removing the alien. As the Executive's 2006 manual explained, deferred action "does not affect periods of unlawful presence as defined in section 212(a)(9) of the Act." *Field Manual*, *supra*, § 20.8(a).

2. DAPA contravenes statutes defining which aliens can work in this country.

In 1986, Congress enacted IRCA to "prohibit the employment of aliens who are unauthorized to work in the United States because they either *entered the country illegally*, or are in an immigration status which does

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[37] Contrary to the OLC memo, no regulation provides for such tolling. *Cf.* J.A. 63. The cited regulations are limited to certain crime and human trafficking victims. 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2).

not permit employment." H.R. Rep. No. 99-682(I), at 46, 51-52 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650, 5655-56 (emphasis added). IRCA supplements removal as an immigration-enforcement tool, by powerfully reducing the economic incentive for unlawful presence. *See id.* at 51-56, 1986 U.S.C.C.A.N. at 5655-60.[38]

The INA specifically defines numerous categories of aliens that are either directly authorized to work or are eligible to obtain work authorization from the Executive. *See* Pet. App. 74a-76a; *supra* pp.7-8. Importantly, when Congress wanted to provide work-authorization eligibility to four narrow classes of deferred-action recipients, it did so by statute. *See supra* p.8 nn.5-8 (citing those categories).[39]

Against the backdrop of that "comprehensive framework," *Arizona*, 132 S. Ct. at 2504, the Executive claims power to unilaterally grant work authorization to any unlawfully present alien it chooses not to remove.[40] Br. 63. This is directly contrary to IRCA's mandate.

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[38] The same is true for the 1996 PRWORA, which amended the Earned Income Tax Credit criteria to require alien recipients to hold a Social Security number, available under 42 U.S.C. § 405(c)(2)(B)(i)(I) only if lawfully present with work authorization. *See supra* p.7.

[39] 8 C.F.R. § 274a.12(c)(14) makes work authorization available to certain aliens granted "deferred action." *Cf.* Br. 42. This provision would cover the four categories of deferred-action recipients that Congress made eligible for work authorization. *See* Pet. App. 195a n.95. But if interpreted as broadly as the Executive claims, this provision is invalid as applied to DAPA recipients, and this claim did not accrue for statute-of-limitations purposes until DAPA was issued. *Cf.* Br. 55.

[40] Defendants' incomplete quotation from *Truax v. Raich* (Br. 40) is highly misleading, as *Truax* explicitly recognized the significance of lawful presence. 239 U.S. 33, 42 (1915) (rejecting

The Executive asserts this sweeping power under 8 U.S.C. § 1103(a). But that is just the original INA's generic charge to enforce the Act. *See supra* p.45. This argument utterly begs the question, by presupposing that the Act gives the Executive the power to issue work authorization to any alien it declines to remove.

To bootstrap their erroneous § 1103(a) argument, defendants reference 8 U.S.C. § 1324a(h)(3)—a definitional section in an IRCA provision regulating employer liability for hiring unauthorized aliens. Br. 42, 63.[41] This section does not convey the broad power claimed by the Executive, Pet. App. 78a-81a—certainly not "expressly," as would be required for "a question of deep 'economic and political significance.'" *King*, 135 S. Ct. at 2489.

Section 1324a regulates employers, creating liability for hiring an "unauthorized alien." 8 U.S.C. § 1324a(a). Section 1324a(h)(3) defines "unauthorized alien" to mean aliens who are not either LPRs or "authorized to be so employed by [the INA] or by the Attorney General."[42] This section merely tells employers that they

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"[t]he assertion of an authority to deny to aliens the opportunity of earning a livelihood *when lawfully admitted* to the state" (emphasis added)).

[41] Defendants argue that § 1324a(h)(3) "ratifies and independently supports" the purportedly preexisting power under § 1103(a). Br. 63. They did not argue that below. And despite explicitly invoking § 1324a(h)(3) in seeking review, Pet. 27, the Executive now says plaintiffs are "focus[ing] on the wrong provision," Br. 63. The Executive's shifting arguments make even more apparent that Congress did not "expressly" delegate the sweeping authority the Executive claims. *King*, 135 S. Ct. at 2489.

[42] The phrase "authorized to be so employed by the [INA]" refers to all the alien categories directly authorized to work by the INA itself, like many recipients of nonimmigrant visas. *See su-*

can rely on work authorization conferred by statute or by the Executive without fear of liability. It does not address the scope of the Executive's delegated power to issue work authorization.

Instead, multiple INA provisions specifically assign the Executive discretion to issue work authorization to intricately defined classes of aliens. *See* Pet. App. 74a-75a; *supra* pp.7-8. Defendants' view would make all those provisions surplusage, so it must be rejected. *Bd. of Trustees of Leland Stanford Jr. Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2196 (2011).

The Fifth Circuit correctly held that the Executive's "limitless" conception of its power "is beyond the scope of what the INA can reasonably be interpreted to authorize." Pet. App. 49a. Section 1324a(h)(3)'s definitional subsection, within a provision creating employer liability, did not covertly grant the Executive power to undo Congress's comprehensive 1986 IRCA reforms with the stroke of a pen. *See Whitman*, 531 U.S. at 468 (Congress does not "hide elephants in mouseholes").

3. DAPA is unsupported by historical practice.

Lacking a convincing argument under the INA, the Executive retreats to a selective portrayal of historical practice. Br. 48-60. "[P]ast practice does not, by itself, create power." *Medellín v. Texas*, 552 U.S. 491, 532 (2008). In all events, "decades of law, practice[,] and dialogue between the Executive and Congress," Br. 60, confirm that DAPA is unlawful.

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pra p.7. The phrase "authorized to be so employed ... by the Attorney General" refers to the alien categories for which the Executive either must or may separately grant work authorization. *See supra* pp.7-8.

a. No previous deferred-action program—not even the DACA memo, J.A. 102-06—said anything about granting lawful presence. *Cf.* Br. 50. Defendants cite various historical programs where the Executive exercised forbearance from removing classes of aliens. Br. 48-50, 55-59. Forbearance from removal, however, cannot transform otherwise unlawful conduct into lawful conduct. *See supra* pp.41-42. And prior to 1996, unlawfully present PRUCOL aliens were still eligible for benefits, so there was little reason even to consider deeming their presence lawful. *See supra* pp.47-49.

Furthermore, many of the historical programs cited by defendants were supported by statutory authorization that Congress has since curtailed. Several programs were forms of "parole," Former Fed. Immigration Officials Br. 5-6; *see* Br. 48, which had been left to the "discretion" of the Attorney General "under such conditions as he may prescribe." 8 U.S.C. § 1182(d)(5)(A) (1952). But Congress clamped down on the Executive's statutory parole authority in 1996. *See* 8 U.S.C. § 1182(d)(5)(A); *supra* p.4.

Other programs, including the 1990 Family Fairness program,[43] offered "extended voluntary departure" that Congress permitted at the time. Br. 48-49; *see* 8 U.S.C. § 1254(e) (1988). But Congress took that power away in 1996, capping voluntary departure at 120 days. 8 U.S.C. § 1229c(a)(2)(A). Even the Executive recognized that this cabined authority could not plausibly support "em-

[43] Family Fairness granted relief to only about 1% of the country's unlawfully present aliens (about 47,000 people), J.A. 368—not 1.5 million people as defendants suggest, Br. 56.

ployment authorization." 62 Fed. Reg. 10,312, 10,324 (Mar. 6, 1997).[44]

After the Executive's class-based use of extended voluntary departure in the Family Fairness program, the Immigration Act of 1990 endorsed only a new, narrow status: "temporary protected status," which is limited to instances of disaster or unrest in an alien's home country. 8 U.S.C. § 1254a. "Extended voluntary departure has not been used since then." Br. 49 n.9.

To be sure, the Immigration Act of 1990 offered targeted relief to some beneficiaries of the Family Fairness program. But Congress's decision to offer limited relief by statute in no way ratifies a claimed Executive authority to grant broader relief unilaterally. *Cf.* Br. 57. In fact, the 1990 Act did not even grant lawful presence. *See* § 301(a), 104 Stat. at 5029 (granting "temporary stay of deportation and work authorization" (capitalization modified)). That is why Congress had to exempt the Act's beneficiaries from IIRIRA's unlawful-presence clock, which would otherwise run. 8 U.S.C. § 1182(a)(9)(B)(iii)(III).

b. Nor does historical practice support DAPA's work-authorization component.

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[44] Similarly, "deferred enforced departure" programs forbear from removing nationals of particular countries. Br. 50. These have been justified under the President's "power to conduct foreign relations." USCIS, *Deferred Enforced Departure*, https://www.uscis.gov/humanitarian/temporary-protected-status/deferred-enforced-departure; *cf.* Br. 2, 31 (alluding to foreign-affairs power). But DAPA nowhere invokes the President's foreign-affairs power; it offers humanitarian rationales. Pet. App. 411a-19a; *see SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (agency action must be judged upon only the grounds the agency expressed). Regardless, DAPA is not limited to aliens from particular countries.

No Executive practice preceding IRCA's comprehensive regulation of alien employment in 1986 can support defendants' position. *Cf.* Br. 50-55. Before 1986, there was no general federal ban on hiring unauthorized aliens. Br. 51. Congress categorically changed that by enacting IRCA to deter employment of unlawfully present aliens. *See supra* pp.50-53. That includes employment of not only DAPA recipients but the unauthorized aliens to whom the Executive claims to have given work authorization "since at least the early 1970s." Br. 60. Congress did not embrace this practice in 1986. Congress repudiated it.

The "background understanding in the legal and regulatory system" at IRCA's enactment does not support the Executive's claimed power to make unauthorized aliens work-eligible by not removing them.[45] *Cf.* Br. 53-54. Congress in 1986 paired employment prohibitions with a "one-time legalization program" for "aliens

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[45] For instance, defendants cite regulations issued in 1952, but they only authorized work incident to a lawful nonimmigrant status—which DAPA beneficiaries, by definition, do not have. Br. 50-51 (citing 8 C.F.R. § 214.2(c) (1952)). And if the Executive stamped other nonimmigrants' papers as work-authorized, that may have satisfied employer internal policies, *see* Br. 51-53, but it did not overcome a (non-existent) general statutory ban on employment. Defendants also cite the Farm Labor Contractor Registration Act Amendments of 1974. Br. 52. But even before IRCA reformed alien employment in 1986, the 1974 amendments did not "ratify" Executive authority to authorize work for millions of unlawfully present aliens. *Cf.* Br. 52. They just relieved farm-labor contractors from penalties if they relied on certain documentation as evidencing LPR or valid nonimmigrant status—which DAPA recipients lack. *Compare* 7 U.S.C. § 2044(b)(6) (1970), *with* 7 U.S.C. §§ 2044(b)(6), 2045(f) (Supp. IV 1974); S. Rep. No. 93-1206, at 6, 9 (1974); 41 Fed. Reg. 26,820, 26,825-26 (June 29, 1976).

who have been present in the United States for several years." H.R. Rep. No. 99-682(I), at 49, 1986 U.S.C.C.A.N. at 5653. This comprehensive reform in no way implies Executive power to create precisely the sort of magnet for unlawful immigration that Congress sought to avoid by adding employment restrictions. *See id.* at 51-56, 1986 U.S.C.C.A.N. at 5655-60.

Post-1986 historical practice is equally unhelpful to defendants' legislative-acquiescence theory. After IRCA defined "unauthorized alien" in 8 U.S.C. § 1324a(h)(3), Congress never amended that provision. *Cf.* Br. 64. Congress has thus consistently maintained its intent to generally "prohibit the employment of aliens" who "entered the country illegally." H.R. Rep. No. 99-682(I), at 46, 1986 U.S.C.C.A.N. at 5650. And Congress reinforced that position in 1996, capping the period of voluntary departure and thus eliminating the basis for work authorization provided under programs like the 1990 Family Fairness program. *See supra* pp.54-55.

The Executive did promulgate a post-IRCA work-authorization regulation that covered a few categories of aliens either with a pending application for status or whom the Executive is forbearing from removing. *E.g.*, 8 C.F.R. § 274a.12(c)(9)-(10), (c)(14), (c)(16).[46] In reject-

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[46] Defendants misleadingly suggest that many classes of aliens covered by this work-authorization regulation are similar to DAPA recipients. Br. 63-64. But for many cited classes, work authorization is ancillary to a legal status. *E.g.*, 8 C.F.R. § 274a.12(a). In fact, over half of defendants' cited classes consist of aliens lawfully admitted with a nonimmigrant visa. *Id.* § 274a.12(a)(6), (a)(9), (c)(3), (c)(5)-(7), (c)(17), (c)(21), (c)(25). The Executive tells this Court that its regulation allows these nonimmigrant-visa holders to obtain work authorization "without specific statutory authorization." Br. 63. But the Executive told another federal court the opposite. Def. Mem. in Opp. 16,

ing an administrative challenge to that aspect of the regulation, the Executive justified the regulation by insisting that the number of aliens covered was so small as "to be not worth recording statistically" and "the impact on the labor market is minimal." 52 Fed. Reg. 46,092, 46,093 (Dec. 4, 1987). Courts, however, did not review that challenge. *Cf. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Proj., Inc.*, 135 S. Ct. 2507, 2520 (2015) (finding congressional acquiescence to "the unanimous holdings of the Courts of Appeals").

The regulation's granting of work-authorization eligibility to deferred-action recipients is valid in the four narrow contexts in which Congress, by statute, deemed deferred-action recipients eligible for work authorization. *See supra* p.8. But these four targeted provisions do not remotely ratify the power to grant work authorization to any of the millions of unlawfully present aliens the Executive chooses not to remove. *Cf.* Br. 58-59. To the contrary, such a view would render those specific provisions surplusage.

Strikingly, defendants admit that DAPA's scope is unprecedented. Br. 62. Congressional acquiescence to a massive program like DAPA cannot be inferred when the agency itself justified its deferred-action regulation based on the minuscule number of work authorizations

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Wash. Alliance of Tech. Workers v. DHS, No. 1:14-cv-00529 (D.D.C. Aug. 12, 2015), ECF No. 36, 2015 WL 4615931 (justifying a rule granting certain work authorization to F-1-student-visa holders because 8 U.S.C. § 1184(a)(1) gave the Executive "the specific authority to determine the conditions for admitting nonimmigrants to the United States"). And the Executive won on that basis. 2015 WL 9810109, at *9 (D.D.C. Aug. 12, 2015) (noting that "the Rule invokes [§ 1184(a)(1)] in listing its sources of authority"), *appeal pending*, No. 15-5239 (D.C. Cir.).

it would allow. 52 Fed. Reg. at 46,092-93. The Executive is unable to point to more than a small number of deferred-action recipients up until 2012, when it created DACA. *See* Pet. App. 322a n.46 (500-1,000 received deferred action annually from 2005 to 2010). And the Executive can identify only a handful of class-based deferred-action programs in the past 50 years, which largely operated as "bridges from one legal status to another." Pet. App. 82a; *see* Pet. App. 81a-82a, 190a & n.78; Josh Blackman, *The Constitutionality of DAPA Part I*, 103 Geo. L.J. Online 96, 119-25 (2015) (historical overview).[47]

So at most, Congress could have possibly acquiesced only to granting work authorization to a small number of aliens with deferred action that bridges legal status. Congress could not have acquiesced to a practice of granting an exponentially larger number of work authorizations than in such deferred-action programs, as DAPA would do. And DAPA is different not only in scale, but in kind: it expressly deems aliens' unlawful presence to be lawful. Previous programs are so dissimilar that they "shed[] no light on the [Executive]'s authority to implement DAPA." Pet. App. 84a.

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[47] Deferred action for VAWA self-petitioners and T- and U-visa applicants deferred removal while applications for imminent legal status were pending. *See* J.A. 216-28, 229-38. Deferred action for students affected by Hurricane Katrina permitted F-visa holders a few months to re-enroll and maintain lawful status. R.675-83. Deferred action for widows and widowers who had a previous legal status maintained the status quo until Congress resolved the issue by eliminating the two-year-marriage requirement for adjusting to LPR status. R.2086-93.

B. At a Minimum, DAPA Required Notice-and-Comment Procedure.

DAPA also violates the APA because the Executive did not comply with applicable notice-and-comment requirements. 5 U.S.C. § 553. The public interest in providing input on one of the largest immigration policy changes in the Nation's history is extraordinarily high. *See, e.g., Hoctor v. USDA*, 82 F.3d 165, 171 (7th Cir. 1996) ("The greater the public interest in a rule, the greater reason to allow the public to participate in its formation."); *Chamber of Commerce of U.S. v. U.S. Dep't of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999) (where "thousands of employers" would be affected by a rule, "[t]he value of ensuring that [the agency] is well-informed and responsive to public comments" is "considerable").

Defendants claim that they were entitled to dispense with this process. Br. 65. They are wrong. DAPA is a "substantive rule" that could only be promulgated through notice and comment. *Chrysler*, 441 U.S. at 302.

1. Defendants do not dispute that DAPA is a "rule" for APA purposes. 5 U.S.C. § 551(4); Pet. App. 54a n.122. Accordingly, DAPA had to be issued through notice-and-comment procedure unless subject to an exception. 5 U.S.C. § 553(b). These exceptions must be read "narrowly," because notice-and-comment procedure advances crucial participation, fairness, and accountability values. *E.g., Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987); *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995). Notice and comment serves as a *procedural* limit on the exercise of delegated authority, which mitigates difficulties in enforcing *substantive* limits on Congress's power to delegate. *See, e.g., Gregory v. Ashcroft*, 501

U.S. 452, 464 (1991); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 338 (2000). If the Executive's power is truly as vast as defendants assert, the public-input and judicial-oversight functions of the notice-and-comment requirement become all the more significant.

Section 553 includes several exceptions, but defendants invoke only one: the "general statements of policy" exception. Br. 65 (citing 5 U.S.C. § 553(b)(A)). The key distinction between policy statements and substantive rules is that policy statements cannot be "binding." *Chrysler*, 441 U.S. at 302; *see Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) ("We thus have said that policy statements are binding on neither the public . . . nor the agency."); John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 916 (2004) (general statements of policy must be "wholly nonbinding").

A rule is binding if it either (1) does not "genuinely leave[] the agency and its decisionmakers free to exercise discretion," or (2) creates "rights and obligations." *E.g.*, *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988); *Prof'ls*, 56 F.3d at 595; *see* Manning, *supra*, at 918-19 (policy statements "must genuinely leave[] the agency . . . free to exercise discretion" (quotation marks omitted)).

The two tests complement each other: "If a statement denies the decisionmaker discretion . . . then the statement is binding, and creates rights and obligations." *McLouth*, 838 F.2d at 1320; Pet. App. 54a-55a. In *Morton v. Ruiz*, this Court held that a vastly more modest rule concerning benefits eligibility "affect[ed] individual rights and obligations" and therefore had to

be treated as a substantive rule. 415 U.S. at 231-37 (1974). The same is true of DAPA, under either test.

2. a. DAPA constrains agency discretion. The President himself compared DAPA to a binding military order: "In the U.S. military, when you get an order, you're expected to follow it." J.A. 790. And the President promised "consequences" for agents "who aren't paying attention to our new directives"—as they would "be answerable to the head of the [DHS]." J.A. 788, 790. The district court appropriately took note of these statements against interest. 2015 WL 1540022, at *3; *see* Pet. App. 59a.

The district court's findings, based on hundreds of pages of record evidence, confirm what the President said: DAPA is binding because it effectively eliminates any discretion in the processing of DAPA applications. Pet. App. 385a-89a. This is the hallmark of a substantive rule. *See, e.g.*, *NRDC v. EPA*, 643 F.3d 311, 321 (D.C. Cir. 2011) ("[B]ecause the Guidance binds EPA regional directors, it cannot, as EPA claims, be considered a mere statement of policy."); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000) (no policy statement if "agency acts as if a document issued at headquarters is controlling in the field"); *U.S. Tel. Ass'n v. FCC*, 28 F.3d 1232, 1235 (D.C. Cir. 1994) (no policy statement where agency's "own staff thought [the rule] was intended to bind").

Defendants (and intervenors) object to this factual finding but do not contend it is clearly erroneous. Br. 71-73; Intv'r Br. 46-48. The court of appeals correctly concluded that, "[f]ar from being clear error, [the] finding was no error whatsoever." Pet. App. 58a n.133; *see* Pet. App. 64a.

The district court's decision was based on numerous factors. The court first found that DACA—the model for DAPA—had been applied mechanically. Pet. App. 56a n.130 (court of appeals holding that this "was not error—clear or otherwise"). In particular, the district court noted DACA's low denial rate (about 5% of 723,000 applications);[48] the Executive's inability to identify any discretionary denials;[49] and the rigid nature of the decisionmaking process prescribed in DACA's lengthy operating procedures. Pet. App. 57a & n.130, 57a-58a & n.133; R.1523-646. Even if there had been a handful of truly discretionary denials out of the 723,000 applications, J.A. 273, that would not come close to transforming the rule into a general policy statement. *See Gen. Elec. Co. v. EPA*, 290 F.3d 377, 384 (D.C. Cir. 2002) (substantive rule where discretion not exercised in "standard cases"); *Guardian Fed. Sav. & Loan Ass'n v. FSLIC*, 589 F.2d 658, 666 (D.C. Cir. 1978) (policy statements cannot narrowly limit discretion "in purpose *or likely effect*" (emphasis added)).

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[48] Defendants suggest, without evidence, that the low denial rate might be driven by self-selection—an argument they did not make in district court. Br. 72. But that issue is "mitigated" by the Executive's pronouncement that it would not attempt to enforce the immigration laws even against failed DACA applicants. Pet. App. 60a. A strong self-selection effect would actually cut against defendants' position by demonstrating that potential DACA recipients who did not satisfy the criteria did not expect discretion to be exercised *in their favor*.

[49] Defendants insist that there were discretionary denials, but again fail to assert that the contrary finding was clearly erroneous. Br. 71-72. And they are wrong. Pet. App. 63a n.140 (explaining that "those allegedly discretionary grounds fell squarely within DACA's objective criteria"); *see* J.A. 656-57.

The Fifth Circuit correctly observed that "DACA is an apt comparator to DAPA." Pet. App. 61a n.139. A major component of DAPA is an expansion of DACA. Pet. App. 415a-16a. Defendants have never suggested that expanded-DACA would operate any differently than original-DACA. Pet. App. 63a n.141. As for the new DAPA program, the "plain language" of the memorandum indicates "that DACA and DAPA would be applied similarly." Pet. App. 61a n.139. In particular, the Secretary "direct[ed] USCIS to establish a process, *similar to DACA*." Pet. App. 416a (emphasis added); *see* Pet. App. 61a n.139 (listing several other linkages). And DAPA, like DACA, uses legislative-style criteria. *See U.S. Tel. Ass'n*, 28 F.3d at 1234 ("It is rather hard to imagine an agency wishing to publish such an exhaustive framework ... if it did not intend to use that framework to cabin its discretion.").

But the relevant evidence was not limited to DACA. The DAPA memorandum is filled with "mandatory, definitive language," which "is a powerful, even potentially dispositive, factor suggesting that [a rule is substantive]."[50] *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 947 (D.C. Cir. 1987); *see* Pet. App. 391a n.103 (collecting examples); *e.g.*, Pet. App. 418a ("ICE and CBP are in-

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[50] Defendants draw attention to purportedly discretionary language in the memorandum. Br. 66-67, 71. But such disclaimers "can ... be negated" by "imperative language" elsewhere in the document. *Interstate Nat. Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 60 (D.C. Cir. 2002). More generally, courts do not accept such disclaimers at face value and must make their own judgment as to the effect of the document. *E.g.*, *CBS Inc. v. United States*, 316 U.S. 407, 416 (1942); *Appalachian Power*, 208 F.3d at 1023. Here, as discussed above, the evidence indicates (and the district court found) that the discretionary language is "pretextual." Pet. App. 59a.

structed to immediately begin identifying persons in their custody . . . .").

The district court also relied on a declaration by Kenneth Palinkas, the president of the union representing USCIS employers processing DACA applications. Pet. App. 57a. Palinkas declared that "[r]outing DAPA applications through service centers instead of field offices . . . prevents officers from conducting case-by-case investigations." Pet. App. 62a (quoting J.A. 375).

And there is now concrete evidence concerning DAPA's implementation. Before DAPA was enjoined, the Executive gave three-year expanded-DACA terms to "more than 100,000 aliens" (unbeknownst to plaintiffs). Pet. App. 63a n.141; *see* J.A. 727-51. And even *after* the injunction issued, the Executive distributed approximately 2,000 additional three-year work-authorization documents—in violation of the injunction. J.A. 752-61. The Executive has never claimed that any of these were discretionary approvals—or that there had been any discretionary denials in this time frame.

This is precisely how the Executive designed DAPA to operate. DAPA's purpose was to cause millions of unlawfully present aliens to "come out of the shadows." Pet. App. 415a. But these aliens could scarcely be expected to identify themselves to the federal government if there was any serious doubt as to how their application would be resolved. Accordingly, the President expressly offered DAPA applicants a "deal": anyone meeting the criteria was "not going to be deported." Pet. App. 384a-85a.

Finally, there is nothing "tentative" about DAPA, confirming that it is not a general policy statement. *See, e.g.*, *Hoctor*, 82 F.3d at 169; *Interstate Nat. Gas. Ass'n*, 285 F.3d at 59; *see also Nat'l Park Hospitality Ass'n v.*

Dep't of Interior, 538 U.S. 803, 808 (2003). To the contrary, DAPA "inform[s] [the public] of a decision already made." *Chamber of Commerce*, 174 F.3d at 213. Defendants have effectively admitted as much by acknowledging that the Secretary has already made his "choice to define [DAPA's] criteria." Br. 69; *see* Pet. 29-30 (DAPA "reflects the Secretary's discretionary judgment"); R.4060 (stating that "the Secretary has established a framework for the exercise of DHS's prosecutorial discretion").[51]

b. Even if DAPA did permit agency discretion, it is still a substantive rule because it "affect[s] individual rights." *Chrysler*, 441 U.S. at 302; *Ruiz*, 415 U.S. at 232. As discussed above, DAPA "modifies substantive rights and interests" by providing access to a variety of valuable rights and benefits, including lawful presence, work authorization, and many others. Pet. App. 64a; *see supra* pp.2-8, 11-13. As one professor put it, "Deferred action may officially walk like a 'discretionary act,' but . . . it quacks like a substantive benefit." Shoba Sivaprasad Wadhia, *Beyond Deportation* 87 (2015).

Defendants concede DAPA is necessary to accomplish the results they seek. *See, e.g.*, Br. 13 (stating that lower-court ruling threatens "millions" of individuals); Pet. 32 (calling DAPA "a federal policy of great importance"); Pet. 33 (injunction "bars approximately 4 million ... from ... receiving authorization to work

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[51] DAPA also indisputably eliminates discretion as to several additional issues, such as the length of the lawful-presence period, the background-check and biometric requirements, and fees. Pet. App. 417a-18a; *see McLouth*, 838 F.2d at 1321 (substantive rule where document "conclusively dispos[ed] of certain issues"); *Prof'ls*, 56 F.3d at 598 ("specifications of precise quantities or limits" suggests substantive rule).

lawfully"); R.5277 ("big apparatus" halted after injunction). The fact that DAPA is necessary to confer lawful presence and work authorization on millions of aliens illustrates that "nothing in the statute, prior regulations, or case law" authorizes DAPA—and that means DAPA "changed the law." *NRDC*, 643 F.3d at 320-21.

The President was therefore correct when he said, "I just took an action to change the law." Pet. App. 384a. And this change is a substantive rule, because "in the absence of the rule there would not be an adequate legislative basis for ... agency action to confer benefits." *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *see* Pet. App. 60a n.137 (DAPA "easily distinguished" from agency actions that lack legal force because it "has an effect on regulated entities" and removes a bar to receiving benefits).

It is a defining feature of general policy statements that an agency "must be prepared to support the policy [in each individual case] just as if the policy statement had never been issued." *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974); *see U.S. Tel. Ass'n*, 28 F.3d at 1235. Yet DAPA is a programmatic directive for providing rights and benefits to millions. DAPA is akin to an exaggerated version of the fact pattern in *Ruiz*, which concerned a change in eligibility for certain benefits. 415 U.S. at 234-35. This "significant eligibility requirement" affected individual rights and had to be treated "as a legislative-type rule."[52] *Id.* at 236. The same holds true here.

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[52] *Lincoln v. Vigil* is inapposite because it concerned an unreviewable decision to "discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation." 508 U.S. 182, 197 (1993). *Lincoln* expressly distinguished *Ruiz* on the

3. Defendants' contrary arguments fail.

First, they suggest that plaintiffs' position would prevent Executive officials from instructing their subordinates without the use of notice and comment. Br. 68-71. But such instructions may not be APA "rules." And defendants ignore the various other exceptions to the APA's notice-and-comment requirement.

For example, an exemption exists for "rule[s] of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). The "distinctive purpose" of that exception is "to ensure that agencies retain latitude in organizing their internal operations." *Bowen*, 834 F.2d at 1047 (quotation marks omitted); *see id.* at 1047-48 (collecting examples). Defendants have not invoked that exemption here, presumably because—as the Fifth Circuit explained—it does not apply to rules that have such a profound effect on third parties. Pet. App. 64a-67a; *see, e.g.*, *Chamber of Commerce*, 174 F.3d at 211 (procedural rules do not alter the rights or interests of regulated parties).

Section 553(b)(A) also exempts "interpretative rules." But DAPA does not even purport to interpret "some extant statute or rule." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014); *cf. Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995).

The exemptions do not stop there. Section 553 includes a "military or foreign affairs" exception, a "public property, loans, grants, benefits, or contracts" exception, and a "good cause" exception. 5 U.S.C.

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ground that the agency in *Lincoln* did not "modify eligibility standards." *Id.* at 198.

§ 553(a)(1), (a)(2), (b)(B).[53] Defendants do not mention any of these exemptions, let alone suggest that their envisioned scenarios would not fall within them.

Not only are defendants' concerns unsubstantiated, but their own approach is dangerous and disruptive. Any change in eligibility criteria—such as the one in *Ruiz*—could be recharacterized as an instruction to subordinates. All of the cases in which purported "guidances" were recognized to be substantive rules could be circumvented in this way.

Second, defendants assert that plaintiffs' position would require notice and comment for exercises of enforcement discretion. Br. 66, 70-71. But DAPA affirmatively grants lawful presence and eligibility for benefits. Instances of mere enforcement discretion are presumptively unreviewable under *Heckler*. *See supra* pp.38-39.

Third, defendants suggest that the rights and benefits conferred by DAPA have already undergone notice and comment. Br. 68. But defendants admit that no such procedure was followed with respect to the tolling of IIRIRA's reentry-bar clock. Br. 68 n.16. And as demonstrated above, the work-authorization regulation defendants cite is limited to statutorily-identified classes of deferred-action recipients—or, at most, uses of deferred action that bridge lawful status. *See supra* pp.51 n.39, 59. In any event, it is conceptual error to attribute DAPA's consequences to other regulations. *See supra* p.40 n.30. DAPA is necessary to allow four million aliens to receive lawful presence and work authorization, so DAPA affects their "individual rights and ob-

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[53] The only one of these that defendants previously invoked is the public-benefits exception, which the Fifth Circuit correctly held to be inapplicable. Pet. App. 67a-68a.

ligations." *Chrysler*, 441 U.S. at 302 (quoting *Ruiz*, 415 U.S. at 232); *see* J.A. 90 (OLC memo acknowledging that "a grant of deferred action ... confer[s] eligibility [for] work authorization").

Finally, defendants insist that they have previously issued similar policies without notice and comment. Br. 66-68, 70. But the Executive has also used notice-and-comment procedures to extend work authorization to other categories of aliens. *See, e.g.*, 80 Fed. Reg. 10,284, 10,284-85 (Feb. 25, 2015); 80 Fed. Reg. 81,900, 81,924 (proposed Dec. 31, 2015). And defendants' examples could only be relevant if (1) the earlier programs were reviewable, (2) they were not subject to a notice-and-comment exception, and (3) they affected individual rights and curtailed discretion to the same extent as DAPA. Defendants do not suggest that any of their examples meet those criteria[54]—and even if they did, defendants could not accrete power by violating the statute.

DAPA cannot be a general policy statement because it constrains agency discretion and grants individual rights. As one of the largest changes in immigration policy in our Nation's history, DAPA was required to go through—if not Congress—at least notice and comment. Any other approach would "enabl[e] agencies to make an end run around" this crucial process that Congress imposed as a condition for the exercise of delegated power. Manning, *supra*, at 893.

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[54] For example, a cited extended-voluntary-departure program was likely committed to agency discretion by statute at that time, *see supra* pp.54-55, and a cited deferred-enforced-departure program may fall under the "foreign affairs" exception, *see supra* p.55 n.44. *Cf.* Br. 70.

IV. DAPA Violates the Executive's Duty to Take Care that the Laws Be Faithfully Executed.

The President's "most important constitutional duty [is] to 'take Care that the Laws be faithfully executed.'" *Lujan*, 504 U.S. at 577 (quoting U.S. Const. art. II, § 3); *see Free Enter. Fund v. PCAOB*, 561 U.S. 477, 493 (2010) (noting President's Take Care "responsibility"). "In the framework of our Constitution," the President's Take Care Clause duty "refutes the idea that he is to be a lawmaker." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

DAPA crosses this line for three reasons. First, it dispenses with immigration statutes by declaring lawful conduct that Congress established as unlawful. Second, DAPA fails even OLC's test. Third, the President's own statements confirm DAPA's unconstitutionality.

This claim is distinct from plaintiffs' statutory arguments, *cf.* Br. 73, and furnishes an independent basis to affirm, *J.E. Riley*, 311 U.S. at 59. Moreover, this claim is immune from any APA reviewability bars. *See supra* Part II; *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) ("the President's actions may still be reviewed for constitutionality" even if APA review is unavailable).

A. Defendants audaciously contend that claims under the Take Care Clause are not justiciable. Br. 73-74. But ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), "the courts [have] asserted power to determine and enforce constitutional and other legal obligations of executive officials." 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 7.2(a) (2016). Defendants cite *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867), which stands only for the proposition that in certain circumstances an injunc-

tion will not lie against the *President*. 13C *Fed. Prac. & Proc.* § 3534.1. But subordinate Executive officers—like several defendants in this case—are "available as an effective target for specific relief." *Id.*; *e.g.*, *Youngstown*, 343 U.S. 579 (suit against Secretary of Commerce).

Defendants also wrongly contend that no cause of action exists. Br. 74. This Court has long recognized a claim for injunctive relief against federal officials' unconstitutional acts. *E.g.*, *Free Enter. Fund*, 561 U.S. at 491 n.2 (collecting cases); *United States v. Lee*, 106 U.S. 196, 220-21 (1882).

Defendants' position is especially hard to reconcile with the seminal *Youngstown* decision. There, too, the Executive argued that its actions were unreviewable and the only "two limitations on the Executive power" were "the ballot box" and "impeachment." J.A. 470. This position was rejected in *Youngstown*, and it must be rejected again here.

B. 1. DAPA violates the Take Care Clause, first, because it declares unlawful conduct to be lawful. That vividly distinguishes this claim from ordinary assertions that an agency exceeded statutory authority. *Cf.* Br. 73.

The Take Care Clause has its roots in the dispute between Parliament and King James II, who was overthrown in the Glorious Revolution of 1688. J.A. 472-81. Parliament was infuriated at King James's use of his purported power to suspend or dispense with Parliament's laws. Zachary Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 676, 690-91 (2014). The subsequent monarchs, William and Mary, agreed to the English Bill of Rights, which stripped the monarchy of all suspending and dispensing authority. *See* English Bill of Rights of 1689, art. 1.

The Glorious Revolution had a profound influence on America's Constitutional Convention. *See* Jack Rakove, *Original Meanings* 20 (1996); Price, *supra*, at 692-94. The Framers unanimously rejected a proposal to grant dispensing powers to the President. *See* 1 *The Records of the Federal Convention of 1787*, 103-04 (Max Farrand rev. ed., 1966). And historical evidence confirms that the Take Care Clause was understood by the Founders to expressly repudiate the President's ability to suspend or dispense with Acts of Congress. *See* 2 James Wilson, *Lectures on Law Part 2*, in *Collected Works of James Wilson* 829, 878 (Kermit L. Hall & Mark David Hall eds., 2007); Christopher N. May, *Presidential Defiance of Unconstitutional Laws* 16 (1998).

This Court has confirmed that understanding. *Kendall v. United States*, 37 U.S. 524 (1838), affirmed mandamus ordering a cabinet official to comply with an Act of Congress. The official argued he could ignore the Act because the President had the exclusive ability to execute the laws. *Id.* at 545-47, 612. The Court disagreed: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the [C]onstitution, and entirely inadmissible." *Id.* at 613. Any other conclusion would "vest[] in the President a dispensing power." *Id.*

DAPA violates these principles by dispensing with immigration statutes. Just as King James attempted to make unlawful office-holding lawful, Price, *supra*, at 691, the Executive seeks to make unlawful presence lawful. Pet. App. 44a, 46a. Under the Constitution, the Executive cannot exercise such legislative power.

Under defendants' view, other troubling Executive actions would be equally permissible. The States have

warned of this danger from the beginning of this case. R.178. A future President could "cease enforcing environmental laws, or the Voting Rights Act, or even the various laws that protect civil rights and equal opportunity"—deeming unlawful conduct to be lawful when faced with resource constraints. Pet. App. 328a. The Court should not "confound[] the permanent executive office with its temporary occupant." *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring). As Justice Douglas put it, "tomorrow another President might use the same power" for another purpose altogether. *Id.* at 633.

Defendants have yet to offer any answer to this concern. The power they assert "either has no beginning or it has no end." *Id.* at 653 (Jackson, J., concurring).

2. DAPA also amounts to unlawful Executive lawmaking under the framework used in the OLC memo approving DAPA. OLC recognized that class-based-deferred-action programs like DAPA "raise particular concerns about whether immigration officials have undertaken to substantively change" immigration statutes, J.A. 80, and "effectively rewrite the laws to match the Executive's policy preferences." J.A. 83; *see* J.A. 49 (explaining limitations imposed by "the nature of the Take Care duty"). Accordingly, the OLC memo concluded that DAPA would be consistent with the Take Care Clause only if several conditions were met. None are.

First, DAPA must reflect the agency's expert judgments about resource allocation, J.A. 49, and must not confer legal status, J.A. 77. But DAPA deems unlawful presence lawful—a fact not mentioned by OLC. J.A. 39-101. DAPA is a programmatic decision to confer benefits on millions of aliens—a significant policy decision that belongs to Congress.

Second, DAPA must be "consonant with, rather than contrary to, the congressional policy underlying the [relevant] statutes." J.A. 49. But DAPA is "incompatible with the expressed or implied will of Congress." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). DAPA violates explicit as well as implicit congressional objectives. *See supra* Part III.A. In *Youngstown*, although the exigency was far more pressing, the issue was left to Congress. The same must be done here.

Third, DAPA cannot be an "[a]bdication of the duties assigned to the agency by statute." J.A. 50. But DAPA is "complete abdication" of lawful-presence and work-authorization statutes as to "a class of millions of individuals." Pet. App. 373a, 374a.

Fourth, DAPA must allow for "case-by-case" discretion. J.A. 51, 72 n.8, 81, 84, 92. DAPA does not. *See supra* pp.62-66.

Notably, though the President claimed to be bound by OLC's analysis, R.2135, defendants have discarded it in this case. Even OLC concluded that DAPA could not be extended to parents of DACA recipients. J.A. 98-101. Yet defendants contend the Executive has the unreviewable power to grant lawful presence and work authorization to *any* unlawfully present aliens it chooses not to remove. Pet. App. 80a-81a, 367a. This pushes what OLC recognized as a highly aggressive assertion of Executive power into an even clearer violation of the Take Care Clause.

3. Finally, the President's own statements call into question whether the immigration statutes are being "faithfully" executed. U.S. Const. art. II, § 3. The President previously stated emphatically that a program like DAPA "would be ignoring the law." J.A. 388; *see* Josh Blackman, *The Constitutionality of DAPA Part II*,

19 Tex. Rev. L. & Pol. 215, 273-76 (2015) (collecting the President's statements). Then after DAPA's announcement, the President admitted that he "took an action to change the law," Pet. App. 384a, and DAPA recipients would get "a legal status," *see supra* p.13. These statements confirm that DAPA is unlawful Executive lawmaking.

* * *

DAPA is an extraordinary assertion of Executive power. The Executive has unilaterally crafted an enormous program—one of the largest changes ever to our Nation's approach to immigration. In doing so, the Executive dispensed with immigration statutes by declaring unlawful conduct to be lawful. This transgressed both the President's own description of his powers and his Office of Legal Counsel's interpretation of them.

Defendants' current position is remarkably aggressive. They insist that DAPA (1) did not affect the States enough to create a case or controversy; (2) cannot be reviewed by any court; (3) falls within the Executive's unbridled discretion; and (4) did not even require notice and comment. This is a dangerously broad conception of Executive power; if left unchecked, it could allow future Executives to dismantle other duly enacted statutes.

This Court has repeatedly maintained the separation of powers and curtailed Executive overreach. *E.g.*, *Medellín*, 552 U.S. 491; *United States v. Nixon*, 418 U.S. 683 (1974); *Youngstown*, 343 U.S. 579. And it has done so recently. *E.g.*, *Horne v. USDA*, 135 S. Ct. 2419 (2015); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Hosanna-Tabor*, 132 S. Ct. 694 (2012). As Justice Jackson wrote in *Youngstown*, the only known "technique for long preserving free government" is that "the Executive be un-

der the law" Congress made. 343 U.S. at 655. "Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up." *Id.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2016